BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Halo Wireless, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. TC-2012-0331
	)	
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.	)	

AT&T MISSOURI'S BRIEF IN SUPPORT OF ITS
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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AT&T Missouri[1] respectfully submits this brief in support of its proposed findings of fact and conclusions of law and in support of its Complaint against Halo Wireless, Inc. ("Halo") for breaches of the parties' interconnection agreement ("ICA").

INTRODUCTION

Halo does not provide service to end users in Missouri. Its sole source of revenue is Transcom Enhanced Services, Inc. ("Transcom"), a related entity that aggregates landline, non-local calls that originate on other carriers' networks (along with other calls) and delivers those calls to Halo. Halo, in turn, delivers the calls to AT&T Missouri for termination to its end user customers and for transport to other carriers, including the rural local exchange carriers ("RLECs") that are parties to this proceeding, for termination to their end user customers. But Halo wrongfully refuses to pay AT&T Missouri, and the RLECs, the access charges they are due for terminating the landline, non-local calls that Halo delivers. The only service Halo or Transcom provides to anyone is access-charge avoidance, and there is no way in which Halo's operations benefit the consuming and using public.

AT&T Missouri requests that this Commission, like the Tennessee Regulatory Authority, the South Carolina Public Service Commission, the Georgia Public Service Commission and the Public Service Commission of Wisconsin, authorize AT&T Missouri to stop accepting traffic from Halo under the ICA. This relief (as well as the additional relief requested by AT&T Missouri and granted by those commissions) is warranted because Halo has committed multiple breaches of its ICA with AT&T Missouri and has violated the Missouri Enhanced Records Exchange Rule. Granting this relief will not harm any Missouri consumer, and will not prevent any calls that used to be routed through Halo from reaching their destinations.

[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri will be referred to in this pleading as "AT&T Missouri" or "AT&T."

The evidence of Halo's breaches of the ICA is straightforward. The ICA requires Halo to send only wireless-originated calls to AT&T. It is undisputed, however, that a large percentage of the calls Halo sends to AT&T begin on landline networks. Halo quibbles about the exact percentage of calls that start on landline networks, but the exact percentage makes no difference because (i) Halo is not allowed to send *any* landline-originated calls to AT&T under the ICA, so even one such call is a breach (though in fact there are hundreds of thousands of such calls), and (ii) even when AT&T accounted for Halo's quibbles, the call records still showed that a substantial majority of the calls originated on landline networks. And despite the terms of the ICA, Halo has made no effort to stop sending these landline-originated calls.

By means of the same conduct that breaches its ICA with AT&T Missouri, Halo has also violated the Enhanced Records Exchange Rule, both with respect to the RLECs, who are therefore entitled to have AT&T Missouri block the traffic Halo delivers to AT&T Missouri to transit to them, and with respect to AT&T Missouri, which is entitled on its own account to block the traffic that Halo delivers to it for termination to its end user customers.

Halo's only defense is its claim that every call Halo sends to AT&T Missouri should be deemed to be originated by Transcom as a local, wireless call, even though most of the calls actually began on landline networks and are not local calls. As shown in AT&T's testimony and this brief, Halo's theory that Transcom originates every call it touches is baseless. Indeed, no one but Halo endorses it. The FCC has rejected Halo's theory; the Tennessee Regulatory Authority has rejected Halo's theory; the South Carolina Public Service Commission has rejected Halo's theory; the Georgia Public Service Commission has rejected Halo's theory; the Public Service Commission of Wisconsin has rejected that theory; and the theory makes no sense. No one from Transcom dials any of the calls that then go to Halo and AT&T. No one from

Transcom takes part in the conversations on those calls. Transcom has no relationship with the calling or called parties on any of those calls. Transcom is merely a middleman, not a call originator. Rather, these calls originate with the actual calling party, *i.e.*, the person who picked up a phone and dialed the number.

If Halo were allowed to launder calls and deem them transformed from landline to wireless and long-distance to local merely by having the calls pass through Transcom first, every carrier in the country could set up a similar arrangement, and no one would ever pay access charges. A landline-originated call from Beijing, China, to St. Louis would be treated as a local wireless call as long as it passed through 150 feet of wireless connection between Transcom and Halo in Wentzville, Missouri.[2] That is the obvious consequence of Halo's theory that Transcom originates every call it touches, and it illustrates why that theory is invalid, how Halo has breached the ICA and violated the Enhanced Records Exchange Rule, and why Halo is liable for access charges on the non-local traffic it sent, and continues to send, to AT&T Missouri.

For these reasons, and as explained further below, the Commission should hold that Halo has materially breached the ICA and grant the relief requested by AT&T.

ARGUMENT

I. HALO IS BREACHING THE ICA BY SENDING LANDLINE-ORIGINATED TRAFFIC TO AT&T.

A. The ICA Requires Halo to Send Only Wireless-Originated Traffic to AT&T.

Halo purports to be a wireless carrier.[3] Based on this claim, Halo entered into a wireless ICA with AT&T.[4] The only traffic the ICA allows Halo to send to AT&T is traffic that originates on wireless equipment. The ICA states:

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[2] Wentzille is the location of the principal Halo/Transcom tower site that serves Missouri. A Halo/Transcom tower site in Junction City, Kansas, also serves Missouri.

[3] EFIS #211, Halo Exhibit A, Russ Wiseman Direct ("Wiseman Direct"), p. 5, line 21.

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

This "wireless traffic only" provision is important because wireless traffic and landline traffic are regulated differently. Most notably, the geographic areas used to determine whether traffic is local (and therefore subject to reciprocal compensation charges) or non-local (and therefore subject to access charges, which are higher) differ greatly for wireless and landline traffic.[6] Wireless traffic is classified as local or non-local based on Major Trading Areas ("MTAs"), which are quite large. For landline traffic, on the other hand, calls are classified as local or non-local based on "local calling areas," which are much smaller.[7] For example, there are only four MTAs in all of Missouri, but more than 720 landline local calling areas.[8] Thus, there is a much greater likelihood that a wireless call will be "local" (also called "intraMTA"), and not subject to access charges, than there is for a landline call. For example, a call from Columbia, Missouri, to Jefferson City, Missouri, is within a single MTA, and so is subject to low reciprocal compensation rates if it is a wireless call, but is between two different landline local calling areas, and so is subject to higher access charge rates, if it is a landline call.

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4 EFIS #217, AT&T Exhibit 1, J. Scott McPhee Direct, ("McPhee Direct"), p.13, lines 10-20.

5 *Id.*, p. 13, line 22 – 14, line 11; Schedule JSM-5.

6 *Id.*, p. 15, line 1 – 16, line 13.

7 *Id.*

8 *Id.*, p. 16, lines 11-13.

All the trunks that Halo ordered to deliver traffic to AT&T were trunks reserved for wireless traffic only.[9] Consistent with this, and assuming Halo was complying with the ICA, AT&T billed Halo for termination as if all of Halo's traffic was wireless-originated, as the ICA required. Fairly quickly, however, AT&T began to suspect that much of the traffic Halo was sending it originated on landline equipment, not wireless equipment.[10] It therefore appeared that Halo was breaching the ICA and engaging in an access charge avoidance scheme, which led to this complaint case.[11]

B. Halo Has Been Sending Large Amounts of Landline-Originated Traffic to AT&T, Which Breaches the ICA and Unlawfully Avoids Access Charges.

It is undisputed that Halo has been sending traffic to AT&T that starts on landline networks. Halo freely admits this. For example, Halo's President, Mr. Wiseman, acknowledges, "Most of the calls probably did start on other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN."[12] That alone proves a breach of the ICA. And as AT&T's call studies show, the extensive scope of the breach proves it was no accident.

AT&T analyzed the calls Halo sent to it during one-week periods in March 2011 and September 2011, and during a four-week period in February-March 2012.[13] AT&T began its analysis by identifying the Calling Party Number ("CPN") on each call received from Halo, *i.e.*, the telephone number of the person who started the call. AT&T then consulted the industry's Local Exchange Routing Guide ("LERG") and the North American Number Portability

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9 EFIS #219, AT&T Exhibit 3, Mark Neinast Direct ("Neinast Direct"), p. 8, lines 7-9.

10 *Id*., p. 8, line 15 – 10, line 9.

11 *Id*.

12 EFIS #211, Wiseman Direct, p. 61, lines 10-11. *See also* EFIS #218, AT&T Exhibit 2, J. Scott McPhee Rebuttal ("McPhee Rebuttal"), p. 2, lines 1-7; EFIS #220, AT&T Exhibit 4, Mark Neinast Rebuttal ("Neinast Rebuttal"), p. 6, line 1 - 7, line 13.

13 EFIS #219, Neinast Direct, p. 11, lines 1-6.

("NANP") database to determine what kind of carrier (landline or wireless) owned that number and whether the carrier that owned the number had designated it in the LERG as landline or wireless.[14] Based on this, AT&T was able to determine how many landline-originated calls Halo was sending.[15] During the three periods reviewed, the call data showed that 22%, 56% and 66%, respectively, of the calls that Halo delivered to AT&T originated as landline calls.[16] In other words, even though the ICA did not allow Halo to send AT&T *any* landline-originated traffic, a substantial portion of the traffic Halo sent to AT&T – two-thirds in the longest and most recent study period – was landline-originated.

Although the percentage of landline-originated calls is large and Halo admits to sending AT&T calls that start on landline networks, Halo nevertheless quibbles about the details of AT&T's call analysis. Halo contends that some calls that originate from what appear to be landline numbers could, in some scenarios, actually originate from a wireless device. Based on this, Halo contends that CPNs are unreliable and cannot be used to identify the origination point or originating carrier on *any* of the calls Halo sends AT&T.[17]

Halo is wrong. Halo presented no call analysis to support its claims, nor did it present any evidence of how much of the traffic it delivers (if any) originates on wireless devices with CPNs that the LERG shows as landline. Halo's failure to present any such evidence is telling, because Halo had access to all of the same data AT&T used for its analyses. Furthermore, while there are some situations where CPN does not precisely identify the origination point or originating carrier of a call, those situations are the exception, not the rule.[18] Simply put, the

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14 *Id.*, p. 12, lines 8-16.

15 *Id.*, p. 12, line 17 – 13, line 6.

16 *Id.*, p. 13, line 17 – 14, line 10; Schedule MN-4.

17 EFIS #211, Wiseman Direct, p. 56, line 16, *et. seq.*

18 EFIS #220, Neinast Rebuttal, p. 9, lines 11-16.

data and methods AT&T used are the same data and methods that the entire industry uses today for determining what AT&T sought to determine.[19] There is no better way, and Halo does not suggest that there is. As the Tennessee Regulatory Authority explained:

> The Authority acknowledges that a certain degree of imprecision can occur when analyzing the origin to individual telephone calls, due to factors such as the advent of number portability and the growth of wireless and IP telephony. However, because of these technical issues, the industry has developed conventions and practices to evaluate calls for the purpose of intercarrier compensation. The Authority finds that the methodology used to collect the data and the interpretation of the data in the AT&T study are based upon common industry practices to classify whether traffic is originated on wireline or wireless networks.[20]

The Georgia Public Service Commission agrees. It stated, "The record also indicates that while telephone numbers are not infallible, they provide the best proxy for customer location in the absence of specific evidence on the customer's location. . . . The Commission finds that the call records relied upon by . . . AT&T constitute a reasonable proxy for the technology used and the physical origination point of the call. Although these records are not 100 percent accurate, no party offered persuasive evidence of a more reliable and feasible alternative."[21] Similarly, the South Carolina Public Service Commission concluded that "the data and methods AT&T used are the same data and methods that the entire industry uses today for determining what AT&T sought to determine. . . . There is no better way, and Halo does not suggest that there is."[22]

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19 *Id.*

20 EFIS #153, Order, *In re: BellSouth Telecommunications LLC d/b/a AT&T Tennessee v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Jan. 26, 2012) ("*Tennessee Halo Order*"), at 17.

21 EFIS #236, Order on Complaints, *Complaint of TDS Telecom on behalf of its Subsidiaries against Halo Wireless, Inc. Transcom Enhanced Services, Inc. and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and for Expedited Declaratory Relief and Authority to Cease Termination of Traffic*, Docket No. 34219 (Ga. Pub. Serv. Comm'n July 17, 2012) ("*Georgia Halo Order*") at 6-7.

22 EFIS #236, Order Granting Relief against Halo Wireless, *Complaint and Petition for Relief of BellSouth Telecommunications LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Inc.*, Docket No. 2011-304-C (Pub. Serv. Comm. S. Car. July 17, 2012) ("*South Carolina Halo Order*") at 9.

AT&T Missouri also proved that Halo's contentions would make no meaningful difference even if they were correct. AT&T assumed for the sake of argument that 100% of calls from Level 3 and Bandwidth.com numbers were actually wireless-originated, and re-analyzed the call data based on that assumption. This was an overgenerous assumption.[23] Even with this assumption, however, the data still showed that 20%, 49% and 60% of the traffic that Halo sent to AT&T during the three study periods – 60% during the longest and most recent study period – was landline-originated.[24]

In short, there is no doubt that much of the traffic Halo has been sending to AT&T originated on landline networks. That materially breaches the ICA.

C. Halo's Theory That Transcom Originates All Calls is Baseless.

Halo's only defense is its claim that all the calls it sends to AT&T, regardless of who dialed the number or on what carrier's network the call began, should be deemed to originate with Transcom. No one at Transcom dials these calls and neither the calling party nor the called party on any call is a Transcom customer. Nevertheless, Halo contends that whenever a call passes through Transcom, that call is terminated and Transcom then originates a new, local, wireless call before the call reaches Halo. To understand this theory, and its many flaws, we begin by explaining what Transcom is and its arrangement with Halo.

Although Halo and Transcom are technically separate companies, they are closely related. They have overlapping officers and overlapping ownership, and the largest individual

[23] EFIS #219, Neinast Direct, p. 16, lines 16-20.

[24] *Id.*, p. 17, lines 2-7; Schedule MN-6.

stakeholder in both companies is the same person.[25] Transcom is Halo's only paying customer and the source of 100% of Halo's revenues nationwide.[26]

Halo and Transcom are also physically close. Both have equipment at a tower site in Wentzille, Missouri, and the arrangement between them works as follows: Every call that comes to Halo in Missouri first passes from the carrier whose end user customer originated the call to Transcom (typically, indirectly through intermediate carriers) at one of its four switching stations (or data centers) (in Dallas, New York, Atlanta, and Los Angeles.).[27] Transcom then sends the call to its equipment at the Wentzville tower site,[28] where Transcom transmits the call, wirelessly, for about 150 feet to Halo's equipment.[29] Halo then sends the call on to AT&T Missouri's tandem switch for termination to an AT&T Missouri end-user or to be passed on to a third-party carrier for termination.[30] There is no technical reason for the 150-foot link between Transcom and Halo to be wireless. The same connection could be made much less expensively by using a short "CAT-5" cable, and using a cable would increase service reliability.[31] It therefore appears that the only reason Halo spent the money to create a roundabout wireless connection with Transcom, rather than a short and direct-wired connection, was so Halo could attempt to claim that all calls it passes to AT&T are wireless and local.[32]

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25 EFIS #217, McPhee Direct, p. 7, lines 4-5; p. 10, lines 9-10.

26 EFIS #211, Wiseman Direct, p. 47, line 1; EFIS #217, McPhee Direct, p. 8, lines 1-7.

27 *See* Tr. June 26, 2012, at 266, lines 3-20.

28 The description in the text applies equally to calls that pass through the Halo/Transcom tower site in Junction City, Kansas. *See supra* n. 2.

29 EFIS #221, AT&T Exhibit 5, Raymond W. Drause Rebuttal ("Drause Rebuttal"), p. 6, lines 1-13.

30 *Id*., p. 6, line 14 – 7, line 2; Schedule RD-3.

31 *Id*., p. 7, line 3 - 8, line 15.

32 *Id*. At hearing, counsel for Halo suggested that the wireless connection between Transcom and Halo could be eliminated by using a cable if the distance between the Transcom equipment and the Halo equipment were greater. *See* Tr. June 26, 2012, at 222, lines 4-7. That suggestion fell flat, for two reasons. First, a CAT-5 cable can carry IP voice packets more than 100 meters if a regenerator is used. *Id*. at 222, lines 8-15. Second, the wireless

To envision how a call flows through this arrangement, assume a call begins with a girl picking up her landline phone in California and dialing her grandmother in St. Louis.[33] That landline call would travel across the country, eventually hit Transcom's equipment at the Wentzville tower, travel wirelessly to Halo for 150 feet and then be handed off to AT&T Missouri, which would terminate the call in St. Louis on its landline network and thus enable the girl and her grandmother to talk to each other. That call originated with the girl in California, who is the calling party, and is a non-local, landline-originated call, subject to access charges. According to Halo, however, when the girl's call reaches Transcom's equipment in Wentzville, Transcom terminates the call and then originates a new call to the grandmother that is both local and wireless, and, therefore, is only subject to reciprocal compensation charges. Halo makes this argument even though the calling party (the girl who started the call) has no relationship with Transcom, did not dial Transcom's number, has no idea Transcom is even involved with the call, and ends up talking to the person she dialed in the first place (her grandmother) without dialing any extra numbers or codes.[34]

The "logic" of Halo's "Transcom origination" theory runs as follows:

1. Transcom is an enhanced service provider ("ESP") under federal law.

2. As an ESP, Transcom is treated like an end-user for purposes of access charges.

3. Therefore, Transcom must be treated as an end user for all purposes.

4. Since Transcom is treated as an end user, all calls must be deemed to terminate to Transcom and originate with Transcom.

5. Therefore, a call from California to St. Louis that is routed in the manner depicted in Neinast Schedule MN-7 terminates with Transcom, which then originates a

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connection could be eliminated without even using a cable, by having the traffic transferred from Transcom to Halo within the Ethernet switch that Transcom and Halo share. *Id*. at 223, line 16 - 224, line 11.

33 *See* EFIS #219, Neinast Direct, p. 19; Schedule MN-7.

34 *See id.*, p. 19 n.13.

new, wireless call, which passes through Halo and then to AT&T in the same MTA as Transcom.

6. Thus, the call that AT&T receives from Halo is originated wirelessly, with Transcom, and Halo is not breaching its ICA.

Halo's theory fails for at least four reasons: (1) the FCC and four state commissions, so far, have rejected it; (2) there is no authority for the proposition that ESPs originate every call they touch; (3) Transcom is not an ESP in any event; and (4) even if Transcom were an ESP and did originate calls, the purported "origination" occurs on Transcom's landline equipment, and the calls would therefore be landline-originated (in breach of the ICA) and non-local (and thus subject to access charges). As Counsel for Staff succinctly put it, "If it starts as a landline call and it ends as a landline call, the Staff's steadfast position is and has been and will continue to be that it is a landline call."[35]

1. Every Regulatory Agency That Has Considered Halo's Theory Has Rejected It.

The FCC has rejected Halo's theory. In its recent *Connect America Order*,[36] the FCC singled out Halo by name, described Halo's arrangement of having traffic pass through a purported ESP (*i.e.*, Transcom) before reaching Halo,[37] noted Halo's theory that calls in this arrangement are "re-originated" in the middle by Transcom, and flatly rejected that theory. The FCC's discussion at paragraphs 1003-06 is worth quoting in full:

> 1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. As noted above, this rule, referred to as

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[35] Tr. June 26, 2012, at 88, lines 9-11.

[36] *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011) ("*Connect America Order*").

[37] The FCC was well aware that Halo was arguing that Transcom is an ESP and therefore must be deemed to originate all calls that pass through it. Halo made this argument explicitly in its *ex parte* submissions to the FCC, which the FCC cited and relied on in the *Connect America Order* as describing Halo's position. *See Connect America Order*, nn. 2120-2122, 2128; (EFIS #217, McPhee Direct, p. 18 n.20; Schedules JSM-6, JSM-7).

the "intraMTA rule," also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia*, on the proper interpretation of this rule.

1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.

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

1006. We clarify that ***a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider***. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that ***the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position.*** [Emphasis added, footnotes omitted].

The FCC thus conclusively rejected Halo's theory that calls that begin with an end-user dialing a call on a landline network are somehow "re-originated" and transformed into wireless

calls simply by passing through Transcom. In fact, Halo concedes that the FCC rejected its theory; Halo witness Wiseman stated, "we acknowledge that the FCC … apparently now believes ESPs … do not originate calls."[38] The FCC said that a call is originated wirelessly only if the "calling party" – the person dialing the phone number – initiated the call through a wireless carrier. Many, if not most, of the calls Halo has been sending to AT&T Missouri did not originate that way, as AT&T's call studies showed.

Agreeing with the FCC, the Tennessee Regulatory Authority also rejected Halo's origination theory earlier this year in a decision in favor of AT&T Tennessee on the identical issue.[39] Among other things, the TRA found, based on Halo's *ex parte* filings in the *Connect America* case, that the FCC was aware of Halo's theory that Transcom originates (or re-originates) every call it touches, and has rejected that theory.[40] The TRA's decision sustaining AT&T Tennessee's claims is thorough and well-reasoned, and AT&T commends it to the Commission's attention.

The South Carolina Public Service Commission ("SCPSC") also sustained the same claims that AT&T Missouri asserts against Halo in this case. On July 17, 2012, the SCPSC decided:

> Halo has materially breached the ICA by . . . sending landline-originated traffic to AT&T [and] inserting incorrect CN information on calls . . . As a result of these material breaches, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo. . . . Halo is liable to AT&T

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[38] EFIS #211, Wiseman Direct, p. 54, lines 3-4. Endowing a phrase in the first sentence of paragraph 1006 of the *Connect America Order* with a significance the FCC plainly did not intend, Halo has suggested that the FCC rejected its theory only "for purposes of the intraMTA rule," and not for purposes of the parties' ICA. But the very purpose of the provision in the ICA that permits Halo to deliver traffic to AT&T only if it originates on wireless equipment is to implement the intraMTA rule. Halo's notion that the FCC's ruling leaves open the possibility that the traffic at issue here originates with Transcom for purposes of the ICA, even though it does not originate with Transcom for purposes of the intraMTA rule, is desperately mistaken.

[39] EFIS #153, *Tennessee Halo Order* at 15-17.

[40] *Id.*

> for access charges on the interstate and interLATA access traffic it has sent to AT&T . . . .[41]

The Public Service Commission of Wisconsin ("PSCW") and the Georgia Public Service Commission ("GPSC") reached similar conclusions. On July 12, 2012, the PSCW decided that Halo violated its ICA with AT&T Wisconsin by routing landline-originated traffic to AT&T for termination by AT&T and other LECs; that AT&T should be permitted to discontinue performance under the ICA; and that access charges should apply to much of the Transcom-Halo handled traffic.[42] And on July 17, 2012, the GPSC concluded that "Halo has materially breached its interconnection agreement with AT&T by (1) sending landline-originated traffic to AT&T, [and] (2) inserting incorrect Charge Number information on calls . . . . As a result of these breaches, AT&T is excused from further performance under the parties' interconnection agreement and may stop accepting traffic from Halo."[43]

2. ESPs Do Not Originate Every Call They Touch.

Even if Transcom were an ESP (a claim we refute below), there is no authority for Halo's claim that ESPs terminate every call they touch and then originate a new call. That is not surprising, for the argument defies common sense. If the girl in California picks up her landline phone, dials her grandmother in Missouri, and they have a conversation, that is one call, not two calls. No new, separate call exists merely because the girl's call passed through Transcom's equipment somewhere along the way. The only call here is the call from the girl in California to her grandmother in Missouri – after all, the girl did not call Transcom.[44]

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[41] EFIS #236, *South Carolina Halo Order* at 6.

[42] The PSCW deliberated and voted at an open meeting on July 12, 2012. The PSCW is expected to issue a written order soon. When it does, AT&T Missouri will submit it to the Commission.

[43] EFIS #236, *Georgia Halo Order* at 15.

[44] As the GPSC put it, such a communication "constitutes a single call. In other words, Staff recommended that the Commission reject the argument that Transcom originates a second call when it hands the call off to Halo. The Commission adopts this Staff recommendation." *Id*. at 7.

Halo's theory rests on the idea that ESPs are deemed to be end-users, and therefore (according to Halo) Transcom must be deemed to originate every call that passes through their equipment. Nothing in the law says that. To the contrary, the FCC has made clear that ESPs "are treated as end-users *for the purpose of applying access charges*"[45] only and "are treated as end users *for purposes of our access charge rules*."[46] Thus, the "ESP exemption" is a legal fiction that allows ESPs to be treated like end users *for the purpose of not having to pay access charges*. That does not mean an ESP could use this limited "end-user" status to claim it "originates" calls that actually began when someone else picked up a phone and dialed a number. Transcom does not start the call (the calling party does), does not decide who will be called (the calling party does), and does not provide the voice content that the parties exchange on the call.[47] Moreover, the ESP exemption from access charges applies only to the ESP itself, not to any telecommunications carrier that serves the ESP, which means that any ESP exemption for Transcom would not apply to Halo anyway.[48]

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[45] EFIS #238, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, ¶ 11 (2001) ("*ISP Remand Order*") (emphasis added, subsequent history omitted).

[46] EFIS #126, *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987) ("*Northwestern Bell Order*"). Five years after it was issued, this decision was vacated as moot. 7 FCC Rcd. 5644 (1992). The decision still carries weight, however, as the FCC's explanation of the ESP exemption.

[47] As the South Carolina Commission concluded, "Halo has cited no authority supporting its claim that ESPS terminate every call they touch and then originate a new call." EFIS #236, *South Carolina Halo Order* at 14.

[48] EFIS #126, *Northwestern Bell Order*, 2 FCC Rcd. 5986, ¶ 21 (1987); EFIS #240, *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 24, 42 (Ill. Comm. Comm'n Feb. 11, 2009) (the ESP exemption "exempts ESPs, and *only* ESPs, from certain access charges" and does not apply to carriers that transport calls for ESPs); EFIS #241, *Pacific Bell Tel. Co. v. Global NAPs Cal., Inc.*, D.09-01-038, Order Denying Rehearing of D.08-09-027, at 11, 2009 WL 254838, at *5 (Cal. P.U.C. Jan. 29, 2009) ("the [ESP] exemption applies only to the ESP itself, not to the carrier of ESP traffic"); EFIS #242, *In re Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas*, Order No. 16, Dkt., Nos. 06-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 868 *26-27 (Kan. Corp. Comm'n 2005) ("that [ESP] exemption applies to the information service provider, not to carriers . . . that provide service to ESPs and other customers"). Thus, regardless of Transcom's purported status, there is no basis for *Halo* to claim it is exempt from access charges on the toll traffic it has been sending to AT&T.

The FCC has never held that an ESP "originates" calls that started elsewhere and end elsewhere and merely pass through the ESP somewhere in the middle.[49] To the contrary, the FCC rejected Halo's theory that Transcom originates calls in the *Connect America Order* (¶¶ 1005-06). The FCC also rejected a similar two-call theory several years earlier. In that case, legacy AT&T (pre-SBC merger AT&T) provided a calling card service where, during call set-up, the calling party heard an advertisement from the retailer that sold the card. *AT&T Calling Card Order*, 20 FCC Rcd. 4826, ¶ 6.[50] Legacy AT&T argued that this was an enhanced service and that the "first stage of the call," where the caller heard the advertisement, was "separate from the communication between the calling party and the called party," and therefore "created an endpoint" that "divided [the] calling card communication into two calls." *Id*., ¶¶ 8, 23. The FCC rejected that view, finding that the communication with the purported enhanced service platform (the advertising message) did not "create an endpoint" and that communication of the advertising message was merely "incidental" to the single call the end user made. *Id*., ¶ 23. Here, of course, there is no communication at all between Transcom and the calling or called party, so there is even less basis for claiming that Transcom creates an endpoint or originates a new call. Indeed,

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[49] Halo claims that the FCC has found that ESPs – as end users – originate traffic even when they receive the call from some other end-point. But Halo does not cite a single decision by the FCC, or by any other authority, that actually holds this. Halo also tries to compare Transcom to an entity using a "Leaky PBX," as if it that legitimizes Halo's conduct. That comparison to a Leaky PBX is telling, because the FCC long ago recognized that leaky PBXs – just like Halo's and Transcom's current scheme – constituted a form of "access charge avoidance" that needed correction. EFIS #193, *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 87 (1983). *See also* EFIS #220, Neinast Rebuttal, p. 22, line 15 - 23, line 13. Simply put, the only time the FCC has actually addressed what Halo does is in the *Connect America Order*, where it rejected the identical argument Halo is making here.

[50] EFIS #173, Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 (2005) ("*AT&T Calling Card Order"), aff'd, AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

AT&T witness Drause explained that Transcom's equipment is not even *capable* of originating a call, for it does nothing more than convert IP data into a radio signal.[51]

Halo also tries to support its "Transcom origination" theory by citing *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), claiming that the court there functionally held that every ESP is an "origination" "endpoint" on every call.[52] But the decision said nothing of the kind, and in any event has no bearing here. The FCC was well aware of the D.C. Circuit's *Bell Atlantic* decision when it issued the *Connect America Order*, but still rejected Halo's theory that all calls originate with Transcom. *Connect America Order*, ¶¶ 1005-06.[53] The court in *Bell Atlantic* also was not dealing with ESPs in general, but rather was dealing with Internet Service Providers ("ISPs") in particular, so its discussion cannot be generalized to all purported ESPs. Transcom is not an ISP and Halo does not claim it is. Moreover, contrary to Halo's claim, the D.C. Circuit did not hold that ISPs are an origination "endpoint." Rather, it merely remanded to the FCC to consider that alternative as a possible way to look at what those providers do, and on remand the FCC took a different path, so it never had to address the issue.[54]

In addition, Halo's assumption that the D.C. Circuit's discussion of Internet Service Providers in *Bell Atlantic* applies to every ESP is misplaced. For example, in the *AT&T Calling Card Order* the FCC rejected an attempt to compare the "enhanced" calling card service with calls to Internet Service Providers ("ISP-bound calls"). The FCC found that the services were

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51 EFIS #221, Drause Rebuttal, p. 8, line 17 - 9, line 5. *See also* Tr. June 26, 2012 at 224, line 25 - 225, line 2 ("[T]he Cat5 cable has exactly the same capability of originating a phone call as that radio equipment does, which is no ability whatsoever.").

52 EFIS #211, Wiseman Direct, *e.g.*, p. 40, lines 6-8; 53, lines 6-9.

53 The FCC also was well aware of the *Bell Atlantic* decision when it issued the *AT&T Calling Card Order*, which rejected the similar argument that an ESP must be deemed to be an origination "endpoint" on calls initiated by others. EFIS #173, *AT&T Calling Card Order*, ¶¶ 8, 23.

54 The GPSC rejected Halo's reliance on *Bell Atlantic* for similar reasons. EFIS #236, *Georgia Halo Order* at 8.

not analogous, because while calls to ISPs "may consist of multiple communications," a call from a calling card user is different, because "the only relevant communication" in that situation "is from the calling card caller to the called party." *AT&T Calling Card Order*, ¶¶ 25-26. The same analysis applies here, where "the only relevant communication" is between the calling party and the called party.[55]

Halo relies heavily on decisions by bankruptcy courts during Transcom's bankruptcy proceeding several years ago for the proposition that Transcom is an ESP under federal law. Those decisions are irrelevant here. Only one of these decisions both involved an AT&T entity and actually held (incorrectly) that Transcom is an ESP.[56] That decision, however, was vacated on appeal and carries no precedential or preclusive effect here. *See id.* at 1 (upper right-hand corner); EFIS #244, *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) (collecting cases).[57] The Pennsylvania, Tennessee, South Carolina, Georgia and Wisconsin commissions have already evaluated this same issue and found that the bankruptcy rulings have no preclusive effect.[58]

More fundamentally, even if Transcom were an ESP, and were deemed to be an end-user for purposes of access charges, that would only make a difference in this case if Transcom were therefore deemed to originate (and transform to wireless) every call it touches, regardless of

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[55] When an ISP's customer seeks to establish a dial-up connection to the internet, he or she dials the ISP's phone number. This is starkly different from the situation here, where the calling party does not dial Transcom's phone number, and does not even know that Transcom exists. Thus, even if one were to conclude that an ISP terminates its customer's call and then originates a further communication with the internet, it by no means follows that Transcom performs a similar termination and origination.

[56] That decision is Exhibit 1 to EFIS #212, Halo Exhibit B, Robert Johnson Direct ("Johnson Direct").

[57] The other decision, the one confirming Transcom's plan of reorganization, did not resolve any dispute between parties regarding whether Transcom was an ESP – much less whether all calls that pass through Transcom must be deemed to be wireless-originated – because that point was neither contested in the proceedings leading to that order, nor was it necessary to the order. Accordingly, the order has no preclusive effect. EFIS #245, *E.g.*, RESTATEMENT (SECOND) OF JUDGMENTS, § 16 comment c.

[58] *See* EFIS #153, *Tennessee Halo Order* at 22 n.85; EFIS #236 *Georgia Halo Order* at 3, 10; *S. Carolina Halo Order* at 19. The Wisconsin Commission has not yet issued a written order.

where or on what type of network the call began. None of the bankruptcy rulings addresses, much less decides, that origination issue, which means those decisions have no bearing on this case.

Finally, Halo has argued that even if Transcom is not an ESP, it still must be deemed to originate every call it touches. Halo claims that every entity must either be a common carrier or an end-user, that Transcom is not a common carrier and therefore must be an end-user, and therefore that Transcom originates every call it touches. Halo has failed to establish its premise, *i.e.*, that every entity involved in the world of communications must be either a common carrier or an end user. But even if Transcom were deemed to be an end-user based on Halo's definitional word games, Halo's theory would still fail. While it is true that end-users *can* originate calls, there is no legal or logical support for the idea that a purported end-user must be deemed to originate every call it touches – especially when the call was started by someone else and all the "end-user in the middle" does is pass the call along to Halo. Indeed, if Halo's theory were correct, it would mean an end to all access charges, since every carrier would simply have all its calls first pass through a purported "end-user" in the same local area where the call will be terminated, and then claim that by passing through that "end-user" every single call was originated as a local call.

3. Transcom is Not an ESP.

Even though Halo's theory fails regardless of whether Transcom is an ESP, the fact is that Transcom does not qualify as an ESP. To be an ESP, Transcom must provide an "enhanced service." The FCC defines "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide

> the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

EFIS #246, 47 C.F.R. § 64.702(a). In applying this definition, the FCC has consistently held that a service is not "enhanced" when it is merely "incidental" to the underlying telephone service or merely "facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that in deciding whether a service is "enhanced" one must use the end-user's perspective.[59] The FCC typically describes services that do not alter the fundamental character of the telephone service as "adjunct-to-basic," meaning they are not "enhanced services." *See* EFIS #173, *AT&T Calling Card Order*, ¶ 16 & n.28.[60]

Transcom claims it provides enhanced service because it takes steps to minimize background noise on a voice call and inserts "comfort noise" during periods of silence so the parties do not think the call has been disconnected.[61] In other words, Transcom does not in any way alter or add to the content of any call. Rather, the parties still say their own words and that is all that gets transmitted. Transcom just tries to make the voice communications more clear. As AT&T witnesses Neinast and Drause both explained, suppressing background noise and adding comfort noise are not "enhancements" to the underlying voice telecommunications service. They are merely the same type of call-conditioning that carriers normally provide, and

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[59] EFIS #247, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

[60] Halo has argued that Transcom's service technically cannot be "adjunct-to-basic" because Transcom does not provide basic telephone service. That both is incorrect and misses the point. Even if Transcom does not provide basic telephone service, that does not mean it therefore must be deemed to provide an enhanced service. The "adjunct-to-basic" terminology is used to distinguish *any* service that does not change the fundamental character of the telephone service the end-user is using, regardless of who provides that basic telephone service.

[61] EFIS #212, Johnson Direct, p. 15, line 1 - 16, line 21.

have provided for some time, as an incidental part of voice service (*e.g.*, by using repeaters to boost a voice signal over long distances).[62]

The FCC's decisions likewise show that Transcom is not providing enhanced service. In the *AT&T Calling Card Order*, for example, legacy AT&T argued that a calling card service was "enhanced" because, during call set-up, the caller heard an advertising message from the retailer that sold the card and was given options to push buttons to do things other than complete the call (*e.g.* buy more calling minutes on the calling card), and also because some of the transport of the call was over AT&T's Internet backbone using Internet Protocol ("IP") technology. EFIS #173, *AT&T Calling Card Order*, ¶¶ 6, 11-12. The FCC held that this service was not "enhanced" under FCC Rule 64.702. *Id*., ¶ 16. As the FCC explained:

> Because the advertising message is ***provided automatically, without the advance knowledge or consent of the customer, there is no "offer" to the customer of anything other than telephone service, nor is the customer provided with the "capability" to do anything other than make a telephone call.***
>
> . . . We find that the advertising message provided to the calling party in this case is incidental to the underlying service offered to the card-holder and does not in any way alter the fundamental character of that telecommunications service. From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call . . . .

EFIS #173, *AT&T Calling Card Order*, ¶¶ 15-16 (emphasis added).

The same analysis applies to Transcom's service, which is even more invisible to the calling party. Transcom's involvement in the calls at issue here occurs "automatically, without the advance knowledge or consent of the customer [*i.e.*, the person making the call]" and Transcom does not provide any service to the calling party.[63] Nor does the calling party receive

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[62] EFIS #219, Neinast Direct, p. 22, line 16 – 23, line 12; EFIS #221, Drause Rebuttal, p. 11, line 3 – 14, line 15.

[63] EFIS #212, Johnson Direct, p. 8, lines 7-11.

from Transcom (or from his or her own carrier) "anything other than [the capability to] make a telephone call." EFIS #173, *AT&T Calling Card Order*, ¶¶ 16-17.

Moreover, the FCC noted that none of the packaging material for the calling card service in the *AT&T Calling Card Order* mentioned the alleged enhancement of using the cards to listen to advertisements, which led the FCC to conclude that no enhancement or special capability was being "offered" to customers. *Id.* ¶ 15. The same is true here, because none of Transcom's written marketing materials makes any mention of the purported "enhancements" that Transcom provides, so there is no "offering" of any enhancement.[64] Indeed, until recently Transcom's website flatly stated that Transcom's "core service offering" is "Voice Termination Service," *not* any purported service enhancements.[65] And until recent changes made in response to AT&T's testimony, Transcom's website never mentioned any purported "enhancements" to service quality at all.[66] Likewise, the supposed "enhancements" are so incidental that they are not even mentioned in Transcom's contracts with its customers.[67] It is difficult to take Transcom's claims about enhancing calls seriously when Transcom itself did not find them worth mentioning in its marketing materials, customer contracts, or website. At best, then, whatever Transcom does is merely "incidental" to the underlying telecommunications service provided by the calling party's carrier, and therefore does not qualify as an enhanced service. EFIS #173, *AT&T Calling Card Order*, ¶ 16 & n.28.

The FCC's *IP-in-the-Middle Order* further shows why Transcom's service is not an "enhanced service." In that case, the FCC held that AT&T's IP telephony service was not an

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64 EFIS #218, McPhee Rebuttal, p. 4, lines 7-19.

65 *Id.*, p. 4, lines 1-6.

66 EFIS #217, McPhee Direct, p. 9, lines 6-18.

67 EFIS #218, McPhee Rebuttal, p. 4, lines 16-19.

enhanced service, finding that it "(1) use[d] ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate[d] and terminate[d] on the public switched telephone network (PSTN); and (3) under[went] no net protocol conversion and provide[d] no enhanced functionality to end users due to the provider's use of IP technology."[68] As the FCC put it, "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service," which means that the IP-in-the-middle service was not an enhanced service. EFIS #248, *IP-in-the-Middle Order*, ¶ 15.

All of those things are also true of Transcom's service. The end-users that make calls do not order a different service (indeed, they do not order any service from Transcom[69]); they do not pay different rates because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, "[f]rom the customer's perspective" – the perspective of the end-user making the call – anything Transcom does is merely "incidental" to or "adjunct to" the underlying voice service provided by the caller's carrier, does not alter the "fundamental character" of that underlying service, and is therefore not an "enhanced service." EFIS #173, *AT&T Calling Card Order*, ¶ 16.[70]

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[68] EFIS #248, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 1 (2004) ("*IP-in-the-Middle Order*").

[69] Transcom does not serve any actual end users. Rather, it provides wholesale service to carriers and other providers. As Transcom's representative testified, "Transcom does not deal with ultimate consumers [*i.e.*, end-users] and does not provide any service to them. Transcom has no relationship with their distant third parties [*i.e.*, end-users] at all." EFIS #212, Johnson Direct, 8, lines 7-9.

[70] Further evidence that Transcom does not alter the "fundamental character" of the calls that pass through it on the way to Halo and AT&T is that the calls still fit easily within the definition of "telecommunications" in 47 U.S.C. § 153(50). The definition states that "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content thereof." The calls at issue here, *e.g.*, a call from a girl in California to a relative in St. Louis, involve transmission "between or among points specified by the user" (the girl specifies her landline phone in California and her grandmother's phone in St. Louis), of "information of the user's choosing" (the voice communication with her relative), "without change in the form or content of the information as sent or received," since the words the girl speaks in California are the same words that reach her grandmother in St. Louis.

These are but a few examples of decisions holding that services offering much more to the calling party than Transcom's service does still are not enhanced services. There are many others. *See* EFIS #249, Order, *In the Matter of Federal-State Joint Board on Universal Service*, 22 FCC Rcd. 11811, ¶¶ 3, 6-9 (Wireline Competition Bureau, 2007) (applying same factors to find that a service providing "supplements to the information typically provided on a caller ID display," such as "advertisements, the time, date, and temperature, account balance, available talk time, and other customized messages" and other functionalities was not enhanced, but was merely "adjunct-to-basic," because the functionalities "do not in any way alter the fundamental character of that telecommunications service"); EFIS #250, *The Time Machine*, 11 FCC Rcd. 1186, ¶ 40 (Common Carrier Bureau 1995) (provision of information regarding the time remaining on a calling card is "incidental to the provision of basic communications services, and therefore is not an enhanced service"); EFIS #250, John T. Nakahata, *Regulating Information Platforms: The Challenge of Rewriting Communications Regulation From the Bottom Up*, 1 J. Telecomm. & High Tech. Law 95, 108 n.52 (2002) (noting that FCC has classified services such as "speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing and call tracking" as "adjunct-to-basic" service, not enhanced service).[71]

[71] Halo has suggested that Transcom's service must be an enhanced service under the so-called "contamination" doctrine. EFIS #211, Wiseman Direct, p. 53, lines 11-13 & n.32. That doctrine does not apply here. The "contamination doctrine" is an FCC-created concept that applies to protocol processing services by value-added network service providers ("VANs"). The doctrine provides that when such carriers offer enhanced protocol processing services in conjunction with basic transmission service, the enhanced service component "contaminates" the basic service component and that such services, when combined with basic telephone service provided by the same carrier, "contaminate" the telephone service such that the entire service is treated as an "enhanced" service. EFIS #252, *Independent Data Comms. Mfrs. Ass'n, Inc.*, 10 FCC Rcd. 13717, at ¶ 18 (1995); EFIS #258, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, at n.52 (1986). Thus, in order for that doctrine to apply, the "contaminating" service must itself be an enhanced service under FCC Rule 64.702. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, at ¶¶ 43-44 (noting that if some protocol processing services were defined as not being "enhanced" services, the contamination doctrine would no longer apply to the

Consistent with the FCC precedent, five state commissions have now expressly ruled that Transcom's service is not an enhanced service. In a Pennsylvania case, a carrier called Global NAPs ("GNAPS") argued that Transcom was an ESP, making all the same claims that Transcom and Halo make here. The Pennsylvania PUC disagreed and held that Transcom is not an ESP, stating as follows:

> GNAPs argues that Transcom's removal of background noise, the insertion of white noise, the insertion of computer developed substitutes for missing content, and the added capacity for the use of short codes to retrieve data during a call all constitute "enhancements" to the traffic that Transcom passes on to GNAPs. [citation omitted] Palmerton responds that the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony. . . . .
>
> In view of the evidence presented and the FCC's rulings in the two AT&T cases referenced above [the *AT&T Calling Card Order* and the *IP-in-the-Middle Order*], we find that Transcom does not supply GNAPs with "enhanced" traffic under applicable federal rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges.[72]

Similarly, in the Tennessee case that mirrored this case, the TRA held that Transcom is not an ESP. The TRA found that:

> Transcom only reduces background noise and inserts "comfort noise" in periods of silence so that those periods of silence are not mistaken for the end of a call. . . .The alleged "enhancements" that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those

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underlying basic service component). As shown in the text, however, Transcom's service is not an enhanced service under FCC Rule 64.702 and FCC precedent, so there is no "contamination" of anything.

[72] EFIS #171, *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.,* PA PUC Docket No. C-2009-2093336, 2010 WL 1259661, at 16-17 (Penn. PUC, Feb. 11, 2010).

> types of improvements for years and, in some cases, decades. Carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of those processes are deemed "enhancements" in the sense of an ESP.[73]

Similarly, the Georgia Commission found that "Transcom is not acting as an ESP with regard to the traffic at issue in this [AT&T v. Halo] docket. . . . Transcom's service is . . . what is commonly referred to as 'call conditioning.'. . . Application of [the FCC] standard to the current case shows that Transcom is not providing an enhanced service."[74] The South Carolina Commission discussed the issue at length, and concluded, based upon its thorough analysis that "Transcom does not qualify as an ESP."[75] The Pennsylvania, Tennessee, Georgia and South Carolina Commissions' analyses apply with equal force here, and this Commission should reach the same result: Transcom is not an ESP.[76]

Finally, Transcom admits that it does not enhance all the traffic it hands off to Halo for delivery to AT&T Missouri, even according to Transcom's mistaken view of "enhancement." Indeed Halo witness Johnson, who testified as Transcom's representative, admitted that he has no idea how much of the traffic does not get enhanced.[77] Thus, even if the Commission were to accept Halo's defense based on the premise that Transcom enhances traffic (which it should not for all the reasons discussed above and below), the defense would not apply to an unknown percentage of the traffic at issue, so Halo would still be in breach of the parties' ICA.

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73 EFIS #153, *Tennessee Halo Order*, at 21-22.

74 EFIS #236, G*eorgia Halo Order* at 9-10.

75 EFIS #236, *South Carolina Halo Order* at 20-26.

76 The Wisconsin Commission also concluded Transcom is not an ESP.

77 Tr. June 26, 2012, at 122, line 23 – 123, line 8.

4. Even If Transcom Originated Enhanced Traffic (And It Does Not), the Traffic Would Still Be Landline-Originated Traffic That the ICA Prohibits Halo From Delivering to AT&T.

Halo's theory is that Transcom performs enhancements on the calls it receives from other carriers and then originates the purported enhanced traffic for delivery to Halo. For all of the reasons set forth above, Transcom neither performs enhancements nor originates traffic. Even if that were not the case, however, the purportedly enhanced traffic necessarily would originate from the same locations that Transcom performed the "enhancements," namely, at the Transcom data centers in Atlanta, New York City, Los Angeles and Dallas, *not* at a tower site in Missouri. AT&T Missouri witness testified to that without contradiction.[78]

This is significant for two reasons. First, even if Transcom did originate enhanced traffic, such traffic would originate over landline (not wireless) facilities, and the ICA prohibits Halo from delivering landline-originated traffic to AT&T. Second, traffic, whether wireline or wireless, that originates in Atlanta, New York, Los Angeles or Dallas and terminates in Missouri is non-local traffic to which access charges apply.

II. HALO GAVE AT&T MISSOURI INACCURATE CALL INFORMATION.[79]

The exchange of accurate call detail information between interconnected carriers is essential. This information includes the phone number of the person that originated the call (the

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[78] *Id*. at 235, line 20 - 236, line 6 (" . . . So while I am not saying that there is an origination – or a further origination, I believe is the terminology that your witnesses are commonly using, they're claiming there's a further origination of the call that takes place. And if that further origination were to take place, then the point at which that was taking place would be back at the data center. It wouldn't be at the tower site"); and at 266, lines 206, line 3 – 267, line 14 (stating that Transcom's data centers are in Atlanta, New York City, Los Angeles and Dallas; that there is no wireless equipment at Transcom's data centers; and that a further origination at the data centers therefore would not be wireless). *See also id*. at 241, lines 10-18 (Q: Now, I believe what you are saying is that, well, if you want to get to where it might originate from Transcom, where it really originates is back at the data center, which is not there in the MTA, it's one of the four locations that are involved here? A: That's right. The call -- or the further communication would originate back at a data center.").

[79] AT&T Missouri has not asserted a separate claim against Halo based on its provision of inaccurate call information. However, that misconduct was one of Halo's several violations of the Missouri Enhanced Records Exchange Rule, as we discuss below.

Calling Party Number, or "CPN") and, in some instances, a different number for the person or entity that bears financial responsibility for the call (the Charge Number, or "CN").[80] A Charge Number might be used, for example, when a business has 100 different lines for its employees but wants all calls on those lines to be billed to a single number. In that situation, calls from those 100 lines would include call detail that shows both the CPN, for the actual line that originated the call, and the Charge Number, for the billing number that will be charged for the call.[81] When the call information includes both a CPN and a CN, the CN overrides the CPN and controls how the call is categorized and billed.[82] Specifically, the CN is used to determine the jurisdiction and rating for the call – that is, whether the call is local or non-local, and therefore whether it is subject to reciprocal compensation or access charges.

AT&T, however, discovered that until the end of 2011, Halo inserted inaccurate CNs – CNs that should not have been there at all – on every call that Halo sent to AT&T.[83] Indeed, Halo admits that it inserted a CN assigned to Transcom into the call record on every call it sent to AT&T.[84] Moreover, in every case the CN was local to (*i.e.*, in the same MTA as) the number the call was being terminated to, making the call appear to be local, and thus subject to reciprocal compensation rather than access charges – even when the call was not local.[85] For example, a call destined to Jefferson City may begin in California and would therefore have a California CPN, but Halo would insert a CN that is local to Jefferson City into the call information and thereby make the call appear to be local rather than long-distance.

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80 EFIS #219, Neinast Direct, p. 28, lines 10–17.

81 *Id.*, p. 28, line 18 – 29, line 8.

82 *Id.*, p. 29, lines 8-11.

83 *Id.*, p. 28, lines 4-5; 29, lines 12-18.

84 EFIS #211, Wiseman Direct, p. 66, lines 5-7.

85 EFIS #219, Neinast Direct, p. 29, lines 19-21.

There was no justification for Halo's insertion of a Transcom CN, because Transcom was not the financially responsible party on any of these calls. A CN is used when one party (say, an employer) takes financial responsibility for calls made by another party (say, its employee). Here, however, it is undisputed that there is *no* relationship between Transcom and any of the calling parties that made these calls,[86] and therefore Transcom is *not* the financially responsible party on any of these calls, because Transcom does not pay the phone bills for any of those calling parties. Halo therefore violated the ICA and industry practices for call information.

Halo tries to excuse its conduct with the same argument as on the origination issue, namely that Transcom should be deemed to originate all calls and therefore is financially responsible for them.[87] But Transcom does not originate calls, as shown above. Furthermore, Halo's theory makes no sense. If Transcom actually originated the call, as Halo claims, its number would have shown up in the CPN field (Calling Party Number), not the CN field. The CN field is only used when a party *other than* the party that originated the call will be financially responsible for the call. Consequently, Halo's theory that it inserted the Transcom CN to comply with its view of how the industry treats CN is not credible. As the FCC stated, the CN field "may not contain or be populated with a number associated with an intermediate switch, platform, or gateway," yet that is what Halo did. *Connect America Order*, ¶ 714. In addition, Transcom has no relationship with any of the individuals that actually originate any of these calls, and no reason – or authorization – to have Halo insert a CN to make Transcom financially responsible for these calls originated by strangers through their own separate carriers. Thus, as

[86] EFIS #212, Johnson Direct, p. 8, lines 7-9.

[87] EFIS #211, Wiseman Direct, p. 67, lines 19-23.

the Tennessee, South Carolina and Georgia Commissions all concluded, Halo's insertion of a Transcom Charge Number was improper.[88]

Halo contends that its insertion of the Transcom CN caused no harm, but that is incorrect. Halo first claims there was no harm because the ICA says that AT&T will bill Halo for termination of wireless calls based on a factor for the percentage of calls to be treated as interMTA, rather than billing on a call-by-call basis.[89] That theory fails because the ICA allows that factor to be adjusted based on the actual traffic sent by Halo.[90] As noted above, the industry practice is to determine the local or non-local nature of the traffic based on the CN (when both CPN and CN are present). Inserting an inaccurate CN thus made it more difficult for AT&T to evaluate Halo's traffic (and, indeed, AT&T might never have discovered that the CN was inaccurate if it had not been investigating whether any of Halo's traffic was landline-originated).[91]

Halo also asserts there was no harm to AT&T because the call records that Halo sent to AT&T included the CPN as well as the CN, so AT&T still had the data needed to determine the call's actual starting point.[92] That, however, is akin to a burglar saying he cannot be convicted because he left behind fingerprints that allowed the police to identify him. It is true that, *once AT&T discovered* there was a need to investigate Halo's call information and undertook the cost and burden of conducting that investigation, AT&T was able to use the CPN to determine the true nature of the calls coming from Halo. That is why this complaint case exists. The point,

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88 EFIS #153, *Tennessee Halo Order* at 18; EFIS #236, *Georgia Halo Order* at 11; EFIS #236, *South Carolina Halo Order* at 28-31.

89 EFIS #211, Wiseman Direct, p. 67, lines 7-9.

90 EFIS #220, Neinast Rebuttal, p. 25, line 19 – 26, line 8.

91 *Id.*

92 EFIS #211, Wiseman Direct, p. 67, lines 3-5.

however, is that AT&T had to conduct a special investigation to do that, because otherwise the industry practice is to treat CN as overriding the CPN. By inserting the inaccurate CN, then, Halo masked the true nature of the calls it was sending AT&T until AT&T did the detective work to unmask it. The only apparent reason for Halo's inserting the inaccurate CN was to make the long-distance landline calls that Halo sent to AT&T appear to be local wireless calls, and therefore avoid access charges on what was actually non-local traffic.

This Commission, like the Tennessee, South Carolina and Georgia Commissions, should find that Halo improperly inserted Transcom's Charge Number in the call detail it provided to AT&T Missouri.[93]

III. HALO VIOLATED THE MISSOURI ENHANCED RECORDS EXCHANGE RULE, AND AT&T MISSOURI SHOULD THEREFORE BE PERMITTED TO BLOCK TRAFFIC TO HALO.

The Missouri Enhanced Record Exchange ("ERE") Rule, 4 CSR 240-29.120(2), provides:

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

The Commission announced the Rule's purpose in an explanatory note: "This rule establishes parameters and procedures enabling transiting carriers to block traffic of originating carriers and/or traffic aggregators who fail to comply with rules pertaining to LEC-to-LEC traffic."

The ERE Rule applies here, because AT&T Missouri is a transiting carrier and the traffic Halo delivers to AT&T Missouri traverses the LEC-to-LEC network. Specifically:

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93 *See supra*, n. 88.

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

2. 4 CSR 240-29.020(19) defines "LEC-to-LEC traffic" as "that traffic occurring over the LEC-to-LEC network. LEC-to-LEC traffic does not traverse through an interexchange carrier's point of presence." 4 CSR 240-29.020(18), in turn, defines the "LEC-to-LEC network" as a:

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

3. Halo's traffic traverses the LEC-to-LEC network. In Missouri, LECs use the LEC-to-LEC network to handle traffic exchanged with wireless carriers.[94] Halo represented itself to AT&T Missouri as a wireless carrier and interconnects with AT&T as a wireless carrier through a wireless interconnection agreement.[95]

Halo has violated the ERE Rule by aggregating large amounts of interexchange landline-to-landline traffic and other third-party traffic as if it were wireless originated traffic and using the LEC-to-LEC network to send that traffic to AT&T Missouri. As we further discuss in Section IV.B below, landline-originated interexchange traffic is compensable at tariffed switched access rates. Halo has failed to pay AT&T Missouri the applicable access rates for terminating

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94 EFIS #217, McPhee Direct, p. 24, lines 10-13.

95 *Id.*, p. 24, lines 13-15.

Halo's landline originated interexchange traffic, despite AT&T Missouri's demands that Halo do so.[96]

Halo also violated the ERE Rule by failing to deliver appropriate originating caller identification as required by the Rule. Instead, Halo provided AT&T Missouri (and downstream carriers) with inaccurate Charge Numbers. *See supra* Section II. Although Halo ceased this practice in December of 2011, its provision of that inaccurate information constituted a violation of the ERE rules during the period Halo was providing that information.

Halo's transmitting interLATA wireline traffic over the LEC-to-LEC network in Missouri violates the ERE Rule in a third way: Section 4 CSR 240-29.010(1) of the ERE rule, provides: ". . . interLATA wireline telecommunications traffic shall not be transmitted over the LEC-to-LEC network, but must originate and terminate with the use of an interexchange carrier point of presence as defined in 4 CSR 240-29.020(31) of this chapter . . ." Halo violated that provision by not using an interexchange carrier point of presence to facilitate the termination of its traffic.[97]

Plainly, then, Halo violated the ERE Rule. And AT&T Missouri complied with the procedural requirements of the Rule that are a prerequisite to blocking Halo's traffic: AT&T Missouri notified Halo of its intention to block Halo's traffic pursuant to the ERE Rule on March 19, 2012, by means of a letter sent by email and U.S. certified mail. In that letter, AT&T Missouri set forth the reasons it intended to block Halo's traffic, the date it would do so and the steps Halo could take to prevent the blocking.[98] In addition, the RLEC parties had separately

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96 *See id.*, p. 24 & n.24.

97 4 CSR 240-29.020(31) defines "point of presence": "Point of presence (POP) means the physical location within a LATA where an interexchange carrier processes long distance telephone calls to and from the public switched network. A POP is connected to the public switched network through the use of feature groups A, B and D protocols. Equipment located in a POP does not use feature group C protocol."

98 EFIS #217, McPhee Direct, p. 26, lines 1-7; Schedule JSM-10.

notified Halo that they were requesting AT&T Missouri to block Halo's traffic destined to their exchanges. Upon receipt of the RLECs' blocking requests, AT&T Missouri notified Halo of them, and of AT&T Missouri's obligation under the Commission's rules to comply with the requests, and informed Halo of the steps it could take to prevent the blocking from occurring.[99]

When Halo filed its formal complaint in this proceeding, AT&T Missouri, pursuant to the Commission's rules, ceased its preparations to block Halo's traffic terminating to AT&T Missouri and the other Respondents. AT&T Missouri formally notified the Commission on April 3, 2012, that blocking preparations had ceased pending the Commission's decision.

IV. AT&T IS ENTITLED TO RELIEF FOR HALO'S BREACHES OF ITS ICA.

Separate and apart from the Enhanced Records Exchange rule, AT&T Missouri asks the Commission to grant the following relief as remedies for Halo's breaches of its ICA with AT&T Missouri. All of the relief requested here was granted in the parallel cases in Tennessee, South Carolina, Georgia and Wisconsin:[100]

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

(b) Find that as a result of Halo's material breach of the ICA, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo;

(c) Find, without quantifying any specific amount due, that Halo is liable to AT&T for access charges on the interstate and interLATA access traffic it has sent to AT&T; and

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

A. The Commission Should Authorize AT&T to Discontinue Performance Under the ICA and Stop Accepting Traffic from Halo.

[99] *Id.*, p. 26, lines 9-15 & n.25.

[100] There is an exception: Not all of the commissions had occasion to address all the relief AT&T Missouri seeks here. None of the four commissions denied any of the relief AT&T Missouri requests.

It is black letter law that when a party materially breaches a contract, or breaches the contract in a way so basic as to defeat the purpose of the contract, the other party is excused from further performance. *E.g.*, EFIS #190, *Barnett v. Davis*, 335 S.W.3d 110, 112 (Mo. App. W.D. 2011) (noting "Missouri's first to breach rule, stated in *R.J.S. Security v. Command Security Services, Inc.*, 101 S.W.3d 1, 18 (Mo. App. W.D. 2003) [EFIS #191], which provides that 'a party to a contract cannot claim its benefit where he is the first to violate it.' A breach by one party will excuse the other party's performance, however, only if the breach is material. *Id*."). Halo's breach here – continuously sending huge amounts of landline-originated traffic that the ICA does not allow – plainly defeats the core purpose of the ICA, which was to establish rates, terms, and conditions for *wireless-originated* traffic *only*.

Granting the relief AT&T seeks will not adversely affect any Missouri consumers. No Missouri consumer will lose dial tone when AT&T stops accepting Halo's traffic and there will be no impact on emergency services.[101] In addition, the carriers that now send Halo traffic destined for AT&T either have alternative arrangements to get that traffic to AT&T or can make them very quickly. Halo has not claimed there were any problems with calls being completed in Tennessee after AT&T Tennessee discontinued service to Halo there, nor is AT&T aware of any problems.[102]

In addition, granting the relief AT&T seeks will not run afoul of Halo's ongoing bankruptcy proceeding. AT&T asked for and received the identical relief from the Tennessee Regulatory Authority (*see* EFIS #153, *Tennessee Halo Order* at 22), and then discontinued service to Halo in light of the TRA's Order. Halo complained of this to the bankruptcy court,

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[101] EFIS #219, Neinast Direct, p. 31, lines 9-13.

[102] *Id.*, p. 31, line 14 - 33, line 22.

and the bankruptcy court rejected Halo's complaint.[103] The bankruptcy court found that the TRA "had jurisdiction to interpret and enforce the provisions of the interconnection agreement," that "[t]he TRA's ruling and Order regarding AT&T Tennessee's right to stop accepting traffic is within the TRA's police and regulatory powers and falls with[in] the exception to the automatic stay as found in this Court's 362(b)(4) Order," and that "[t]he TRA's determination that AT&T Tennessee may terminate the ICA is also within the TRA's authority and jurisdiction; however, prior to any termination, AT&T Tennessee must also comply with section 365 of the Bankruptcy Code."[104] AT&T, of course, will comply with Section 365.

B. The Commission Should Declare That Halo Is Liable to AT&T for Access Charges on Non-Local Traffic Halo Delivered to AT&T.

AT&T's federal tariff, filed with the FCC, requires Halo to pay access charges on the interstate traffic AT&T has terminated for Halo, and AT&T's state tariff, filed with this Commission, requires Halo to pay access charges on the intrastate non-local traffic AT&T has terminated for Halo.[105] As demonstrated above, Halo has sent AT&T interexchange traffic (both interstate and intrastate) that Halo has been misrepresenting as local, and thus subject only to reciprocal compensation charges instead of the higher access charges that apply to non-local traffic. AT&T is *not* asking the Commission to determine how much Halo owes AT&T, or how many minutes of access traffic Halo has sent AT&T. Rather, AT&T only asks the Commission to rule that Halo owes AT&T access charges on such access traffic as it has delivered. The court in Halo's bankruptcy case has made clear that this relief is permissible. That court has explained that the only limitation on the relief state commissions can grant for Halo's wrongdoing is that

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103 EFIS # 6, Exhibit 5, Order Denying Plaintiff's Request for Emergency Injunctive Relief, *In re Halo Wireless, Inc.* and *Halo Wireless, Inc. v. BellSouth Telecommunications, LLC*, Case No. 11-42464-btr-11/Adv. Proc. No. 12-04019 (Bankr. E.D. Tex., Feb 6, 2012).

104 *Id.*, ¶¶ 2-4.

105 EFIS #217, McPhee Direct, p. 20, line 16 - 21, line 2.

they should not issue relief involving "*liquidation of the amount* of any claim against the Debtor."[106] That is why AT&T Missouri asks only for a ruling that Halo owes access charges in an amount that remains to be determined, in all likelihood by the bankruptcy court.

Halo has argued that it cannot be required to pay tariffed access charges because, it claims, it technically did not receive access service precisely as it is defined in AT&T's tariffs. For example, Halo contends that it did not receive service from AT&T via a "Feature Group D" arrangement. Such arguments are a baseless smokescreen that exalts form over substance.

As shown above, Halo has sent landline-originated traffic to AT&T in breach of the ICA. As also shown above, a large portion of that landline traffic is non-local in nature, and AT&T terminated that traffic for Halo. Because the landline-originated traffic was not permitted by the ICA, there are no terms in the ICA defining the proper intercarrier compensation that Halo must pay AT&T for terminating that traffic. It is obvious, however, that Halo must pay AT&T *something* more than mere reciprocal compensation on the *non-local* traffic it has been sending to AT&T Missouri for termination. ILECs are not required to terminate non-local calls for free, or at the low reciprocal compensation rates that apply to local traffic. And as the Commission well knows, when AT&T terminates interexchange and interstate calls for other carriers, that is access service, and those carriers must pay the access rates in AT&T's access tariffs. Indeed, if Halo had been forthcoming up front, and acknowledged that it would be sending non-local landline traffic to AT&T, the parties would have dealt with that in an ICA provision requiring Halo to pay tariffed switched access charges on that traffic or by simply having Halo sign up for service under the switched access tariff. The only reason that did not happen is Halo's insistence

[106] EFIS #25, Exhibit B, Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay, *In re Halo Wireless, Inc.,* Case No. 11-42464-btr-11 (Bankr. E.D. Tex., Oct. 26, 2011) (emphasis added).

on erroneously claiming that all of its traffic was local, wireless traffic that originated with Transcom.

Not surprisingly, there is a legal doctrine that covers what Halo has done and that makes clear that Halo must pay AT&T access charges for the non-local traffic it delivered to AT&T for termination – the "constructive ordering" doctrine. Under that doctrine, a carrier "constructively orders" service under a tariff, and therefore must pay the tariffed rate, if it (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of services; and (3) does in fact receive such services.[107] The doctrine applies here.

First, there is no doubt that Halo "is interconnected [to AT&T] in such a manner that it can expect to receive access services." Halo interconnects to AT&T under the ICA and agreed to pay access charges on at least some of the traffic it sent to AT&T (assuming the traffic was all wireless).[108] Halo also knew it was sending traffic to AT&T that started outside the MTA or local calling area where Halo was located and that interMTA and non-local traffic are subject to access charges.

Second, Halo "fail[ed] to take reasonable steps to prevent the receipt of [access] services." Indeed, Halo took *no* steps to prevent the receipt of access services. Halo never tried to stop Transcom from sending it landline-originated traffic that Halo knew (or should have known) began in other local calling areas or other states and continues to knowingly accept that long-distance landline traffic and pass it to AT&T for termination today. *See* EFIS #254, *AT&T Corp. v. Community Health Group*, 931 F. Supp. 719, 723 (S.D. Cal. 1995) (defendants

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[107] EFIS #255, *Advamtel LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000) (*citing United Artists Payphone Corp. v. New York Tel. Co.*, 8 FCC Rcd 5563 at ¶ 13 (1993) and *In re Access Charge Reform*, 14 FCC Rcd 14221 (1999) at ¶ 188).

[108] ICA § 4.2 (Schedule JSM-4).

constructively ordered service because they "have come forth with no showing that they acted in any way to control the unauthorized charging of AT&T … calls to their system" by a hacker).

Third, Halo "did in fact" receive terminating access service from AT&T. As shown throughout this brief and in the AT&T testimony, Halo sent huge amounts of landline-originated non-local traffic to AT&T and AT&T terminated such traffic to its end-users. The termination of long-distance traffic is the essence of terminating switched access service, and the long-established rates for such service are in AT&T's access tariffs. 47 C.F.R. § 69.2(b) (FCC defines "Access service" to include "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."). *See also* Southwestern Bell Telephone Company Access Service Tariff F.C.C. No. 73, Section 6.9; P.S.C. Mo.-No. 36 Access Services Tariff Sections 3.8, 6.11.[109] Those tariffed rates are the rates Halo must pay.

Given that Halo has received terminating access service from AT&T, and under the law has "constructively ordered" that service for all landline traffic it sent to AT&T, the Commission can and should hold that Halo is liable to AT&T for access charges on the long-distance landline traffic Halo has sent to AT&T. The actual amount Halo must pay will be determined in bankruptcy court.

Halo also contends that the FCC held in the *Connect America Order* that Halo's service is merely transit service. Based on this, Halo seems to argue that it cannot owe terminating access charges to AT&T or other carriers. Halo is incorrect. The *Connect America Order* never held that Halo's service is transit service, much less that Halo is exempt from paying terminating access charges when it hands long-distance traffic to AT&T for termination. The issue in the *Connect America Order* was whether Transcom could be deemed to originate every call it

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[109] EFIS #256.

touches and whether the calls Halo was handing to LECs should be treated as local or non-local.[110] The FCC used the term "transit" merely to point out that entities that simply pass calls on in the middle of the call path are not viewed as originating those calls – and that because Transcom did not originate the calls Halo was passing to other carriers for termination, those calls were not local (*i.e.*, not intraMTA) and therefore were not merely subject to reciprocal compensation charges.[111] Rather, as non-local calls, those calls are subject to terminating access charges.

In addition, Halo's *ex partes* to the FCC, which framed the issue there, never once argued that Halo was providing transit service to another carrier. Quite the opposite, Halo argued that it was merely sending locally originated, wireless traffic to ILECs and therefore only had to pay reciprocal compensation, rather than access charges.[112]

The Tennessee, Georgia, South Carolina and Wisconsin Commissions determined that Halo is liable to AT&T for access charges.[113] This Commission should follow suit and rule that Halo is liable to AT&T Missouri for access charges on the interstate and interLATA access traffic it has sent to AT&T Missouri for termination.

CONCLUSION

For the reasons set forth above, the Commission should:

(a) Find that Halo violated the Missouri Records Exchange Rule and that AT&T Missouri may therefore block Halo's traffic pursuant to the Rule,

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

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110 *Connect America Order*, ¶¶ 1004-06.

111 *Id.*

112 EFIS #217, McPhee Direct, Schedules JSM-6 and JSM-7.

113 EFIS #153, *Tennessee Halo Order* at 22; EFIS #236, *Georgia Halo Order* at 15; EFIS #236, *South Carolina Halo Order* at 27. As noted above, the PSCW not yet issued a written order.

(c) Find that as a result of Halo's material breach of the ICA, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo;

(d) Find, without quantifying any specific amount due, that Halo is liable to AT&T for access charges on the interstate and interLATA non-local traffic it has sent to AT&T; and

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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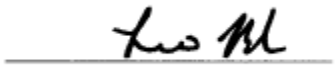

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