BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, LLC dba AT&T TENNESSEE	)	**DOCKET NO. 11-00119**
	)	
v.	)	
	)	
HALO WIRELESS, INC.	)	

ORDER DENYING MOTION TO DISMISS

This matter came before the Hearing Officer of the Tennessee Regulatory Authority ("TRA" or "Authority") at a Scheduling Conference held on December 12, 2011 on the Motion to Dismiss filed by respondent Halo Wireless, Inc. ("Halo"). This matter is on remand to the TRA from the United States District Court for the Middle District of Tennessee. For the reasons stated below, the Motion is DENIED and this matter is set for further proceedings before the Authority as stated in the attached scheduling order.

Travel of the Case

On July 26, 2011, BellSouth Telecommunications, LLC dba AT&T Tennessee ("AT&T") filed a complaint in the TRA against Halo, requesting that the TRA issue an order "allowing it to terminate its wireless interconnection agreement ("ICA") with Halo based on Halo's material breaches of that ICA."[1] The complaint also states that AT&T "seeks an Order

[1] *Complaint*, p. 1 (July 26, 2011). This matter has considerable overlap with Docket No. 11-00108, which was filed by a number of rural local exchange carriers against Halo alleging improper conduct. Both dockets were removed to federal court and remanded, and in both the bankruptcy court's lifting of the automatic stay has returned the complaint to the TRA for adjudication. Certain documents that are relevant to this case are not contained in the docket file for it, but are contained in the file for Docket No. 11-00108. In this Order, the Hearing Officer takes

requiring Halo to pay AT&T Tennessee the amounts Halo owes" as a result of "an access charge avoidance scheme."[2] On August 10, 2011, Halo filed a Suggestion of Bankruptcy informing the TRA that "on August 8, 2011 Halo filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Texas (Sherman Division)."[3] Accordingly, Halo stated, "the automatic stay is now in place" and "prohibits further action against [Halo] in the instant proceeding."[4]

On August 19, 2011, counsel for Halo filed a notice of removal to federal court, which references a separate notice of removal and states that this matter has been removed "to the United States District Court for the Middle District of Tennessee, Nashville Division . . . pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure."[5] Thus, this case was removed to the District Court because of the bankruptcy proceeding. On November 10, 2011, the AT&T filed a letter informing the TRA that it may now hear this matter, the District Court having remanded it to the TRA and the Bankruptcy Court having lifted the automatic stay on a limited basis. AT&T requested that this matter be placed on the agenda for the Authority Conference scheduled for November 21, 2011 "for the purpose of convening a contested case and proceeding with the appointment of a hearing officer."[6] On November 17, 2011, Halo filed a Motion to Abate, in which Halo requested that the TRA "abate" this proceeding until conclusion of Halo's appeal of the Bankruptcy Court's October 26, 2011 Order to the United States Court of Appeals for the Fifth Circuit. On December 1, 2011, Halo filed a partial motion to dismiss the complaint, and AT&T filed its response to Halo's motion on December 8, 2011.

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administrative notice of the file in Docket No. 11-00108 and incorporates the Order in that case denying the Respondents' motions to dismiss, which is being filed contemporaneously herewith, as necessary by reference.

[2] *Id.*

[3] *Suggestion of Bankruptcy*, p. 1 (August 10, 2011).

[4] *Id.* at 2.

[5] *Notice of Removal to Federal Court*, p. 1 (August 19, 2011).

[6] Letter from Joelle Phillips to Chairman Kenneth C. Hill (November 10, 2011).

Consideration of This Matter During the November 21, 2011 Authority Conference

This matter came before the Authority at the regularly scheduled Authority Conference held on November 21, 2011. At that time, the Authority voted unanimously to deny the motion to abate and to convene a contested case in this matter and appoint Chairman Kenneth C. Hill as Hearing Officer to handle any preliminary matters, including entering a protective order, ruling on any intervention requests, setting a procedural schedule, and addressing other preliminary matters.

November 21, 2011 Scheduling Conference and December 12, 2011 Status Conference

Immediately following the Authority Conference, the Hearing Officer convened a scheduling conference in this matter. This matter was reconvened before the Hearing Officer pursuant to notice on December 12, 2011, at which time the parties were heard on the pending motion. The parties were represented on both occasions as follows:

> **For BellSouth Telecommunications, LLC dba AT&T Tennessee – Joelle Phillips, Esq.**, 333 Commerce Street, Suite 2101, Nashville TN 37201.
>
> **For Halo Wireless, Inc. – Paul S. Davidson, Esq.**, Waller Lansden Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, TN 37219; **Steven H. Thomas, Esq.,** McGuire, Craddock & Strother, P.C., 2501 N. Harwood, Suite 1800, Dallas, TX 75201 and **W. Scott McCollough, Esq.**, McCollough/Henry PC, 1250 S. Capital of Texas Higway, Bldg. 2-235, West Lake Hills, TX 78746.

The District Court's Memorandum

In its November 1, 2011 Memorandum, the District Court stated:

> Recently the Bankruptcy Court held that the various state commission proceedings involving the Debtor (Defendant Halo Wireless) are excepted from the Bankruptcy Code's automatic stay, pursuant to 11 U.S.C. § 362(b)(4), so that the commissions can determine whether they have jurisdiction and, if so, whether there is a violation of state law. . . . The Bankruptcy Court held that the automatic stay does apply to prevent parties from bringing or continuing actions for money judgments or efforts to liquidate the amount of the complainants' claims.[7]

The District Court further stated:

[7] *BellSouth Telecommunications, Inc. v. Halo Wireless, Inc,* Case No. 3-11-0795, M.D. Tenn., *Memorandum*, p. 2 (November 1, 2011).

> Plaintiff argues that a claim for interpretation or enforcement of an ICA must be brought in the first instance in the state commission that approved the ICA in question. . . . Plaintiff argues that the jurisdiction of this Court is limited to determining rights under ICAs after final ruling from the state commission. . . . Defendant, on the other hand, contends that this action was properly removed under Section 1452(a) because the TRA proceeding is a "civil action" and that the TRA does not have jurisdiction because the claims implicate federal questions. . . . Defendant also asserts that the claims for relief fall within the Federal Communications Commission ("FCC") exclusive original jurisdiction.[8]

The District Court noted that although "[f]ederal district courts have jurisdiction to review certain types of decisions by state commissions," including decisions under the 1996 Telecommunications Act, "[h]ere, . . . there is no state commission determination to review."[9] The District Court's examination of the relevant federal law is instructive—and directly contrary to Halo's assumptions regarding jurisdiction—and is quoted here at length because of its relevance to this decision:

> The Telecommunications Act of 1996 ("the Act") requires that all ICAs be approved by a state regulatory commission before they become effective. State commissions such as the TRA have authority to approve and disapprove interconnection agreements, such as the one at issue herein. 47 U.S.C. § 252(e)(1). That authority includes the authority to interpret and enforce the provisions of agreements that the state commissions have approved. *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000); *Millennium One Communications, Inc. v. Public Utility Comm'n of Texas*, 361 F.Supp.2d 634, 636 (W.D. Tex. 2005). Federal district courts have jurisdiction to review interpretation and enforcement decisions of the state commissions. *Id.; Southwestern Bell* at p. 480, 47 U.S.C. § 252(e)(6). Here, as noted above, there is no state commission determination to review.
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> In *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 772 (E.D. Va. 2011), the court held that federal district courts have federal question jurisdiction to interpret and enforce an ICA, pursuant to 28 U.S.C. § 1331. *Id. At 778; see also Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278-79 (11th Cir. 2003)(federal courts have jurisdiction under Section 1331 to hear challenges to state commission order interpreting ICAs because they arise under federal law) and *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Servs.*, 323 F.3d 348, 353 (6th Cir. 2003)(federal courts have jurisdiction to review state commission orders for compliance with federal law). Although these cases involved state commission orders, their holdings provide guidance on this issue.

[8] *Id.* at 3-4.
[9] *Id.* at 4.

> Based on the reasoning in the above-cited cases, the Court finds that it has subject matter jurisdiction to hear this matter, pursuant to 28 U.S.C. § 1331 because the ICAs arise under federal law. As stated in *Verizon Maryland*, ICAs are federally mandated agreements and to the extent the ICA imposes a duty consistent with the Act, that duty is a federal requirement. *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004).
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> The fact that this Court has jurisdiction does not end the matter, however. The fact that the Court *could* hear this action does not necessarily mean the Court *should* hear this action. Although the Act details how parties, states and federal courts can draft and approve ICAs, it is silent on how and in what for a parties can enforce ICAs. *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83 (1st Cir. 2010). Because the Act does not specifically mandate exhaustion of state action, whether to construe the Act as prescribing an exhaustion requirement is a matter for the Court's discretionary judgment. *Ohio Bell Tel. Co., Inc. v. Global NAPS Ohio, Inc.*, 540 F.Supp.2d 914, 919 (S.D. Ohio 2008).
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> The Third Circuit Court of Appeals has held that interpretation and enforcement actions that arise after a state commission has approved an ICA must be litigated in the first instance before the relevant state commission. *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 344 (3d Cir. 2007). A party may then proceed to federal court to seek review of the commission's decision. *Id.* Citing *Core,* a district court in Ohio has also held that a complainant is required to first litigate its breach-of-ICA claims before the state commission in order to seek review in the district court. *Ohio Bell,* 540 F.Supp.2d at 919-920 (citing cases from numerous district courts).
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> On the other hand, in *Central Telephone,* the court held that a party to an ICA is not required to exhaust administrative remedies by bringing claims for breach of an ICA first to a state commission. *Central Telephone,* 759 F.Supp.2d at 778 and 786.
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> The Court agrees with the reasoning of the *Core* and *Ohio Bell* opinions. The Act provides for judicial review of a "determination" by the state commission. Until such determination is made, the Court cannot exercise this judicial review. *See Ohio Bell,* 540 F.Supp.2d at 919. As the *Core* court stated: "a state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved." *Core,* 493 F.3d at 343 (citing *BellSouth Telecommunications,* 317 F.3d at 1278, n.9).[10]

On this basis, the District Court remanded the complaint to the TRA, noting that "[t]he Bankruptcy Court has held that the TRA action may proceed except to the extent the parties attempt to obtain and/or enforce a money judgment."[11]

The Bankruptcy Court's Order

In an Order issued on October 26, 2011, the Bankruptcy Court ruled that "pursuant to 11

[10] *Id.* at 4-6.
[11] *Id.* at 6-7.

U.S.C. § 362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 . . . is not applicable to currently pending State Commission Proceedings," including proceedings brought by AT&T.[12] The Bankruptcy Court further stated that

> any regulatory proceedings . . . may be advanced to a conclusion and a decision in respect of such matters may be rendered; provided however, that nothing herein shall permit, as part of such proceedings:
> A. liquidation of the amount of any claim against the Debtor; or
> B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor.[13]

AT&T's Claims

AT&T is an incumbent local exchange carrier ("ILEC") operating in Tennessee. As explained in its Complaint, AT&T seeks TRA adjudication of a dispute over alleged breach of an interconnection agreement between AT&T and Halo:

> AT&T Tennessee seeks an order allowing it to terminate its wireless interconnection agreement ("ICA") with Halo based on Halo's material breaches of that ICA. The ICA does not authorize Halo to send AT&T traffic that does not originate on a wireless network, but Halo, in the furtherance of an access charge avoidance scheme, is sending large volumes of traffic to AT&T Tennessee that does not originate on a wireless network, in violation of the ICA.
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> As a result of this and other unlawful Halo practices, Halo owes AT&T Tennessee significant amounts of money – amounts that grow rapidly each month and that Halo refuses to pay. AT&T Tennessee brings this Complaint in order to terminate the ICA and discontinue its provision of interconnection and traffic transit and termination service to Halo. AT&T Tennessee also seeks an Order requiring Halo to pay AT&T Tennessee for the amounts Halo owes.[14]

AT&T explains the ICA as follows:

> The parties' ICA authorizes Halo to send only wireless-originated traffic to AT&T Tennessee. For example, a recital that the parties added through an amendment to the ICA when Halo adopted the ICA, states:
>
> > 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)

[12] *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay*, p. 1 (October 26, 2011). The Bankruptcy Court's Order is attached hereto.
[13] *Id.* at 2.
[14] *Complaint*, p. 1 (July 26, 2011).

> 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).
>
> Despite that requirement, Halo sends traffic to AT&T Tennessee that is not wireless-originated traffic, but rather is wireline-originated interstate, interLATA or intraLATA toll traffic. The purpose and effect of this breach of the parties' ICA is to avoid payment of the access charges that by law apply to the wireline-originated traffic that Halo is delivering to AT&T Tennessee by disguising the traffic as "Local" wireless-originated traffic that is not subject to access charges. By sending wireline-originated traffic to AT&T Tennessee, Halo is materially violating the parties' ICA.[15]

AT&T further alleges that Halo is altering or deleting call detail:

> The ICA requires Halo to send AT&T Tennessee proper call information to allow AT&T Tennessee to bill Halo for the termination of Halo's traffic. Specifically, Section XIV.G of the ICA provides:
>
> > The parties will provide each other with the proper call information, including all proper translations for routing between networks and any information necessary for billing where BellSouth provides recording capabilities. This exchange of information is required to enable each party to bill properly.
>
> AT&T Tennessee's analysis of call detail information delivered by Halo, however, shows that Halo is consistently altering the Charge Party Number ("CN") on traffic it sends to AT&T Tennessee. This prevents AT&T Tennessee (and likely other, downstream, carriers) from being able to properly bill Halo based on where the traffic originated. That is, Halo's conduct prevents AT&T Tennessee (and likely other, downstream, carriers) from determining where the call originated (and thus whether it is interLATA or intraLATA or interMTA or intraMTA), and thus prevents AT&T Tennessee from using the CN to properly bill Halo for the termination of Halo's traffic.
>
> Halo's alteration of the CN on traffic it sends to AT&T Tennessee materially breaches the ICA. AT&T Tennessee respectfully requests that the Authority authorize AT&T Tennessee to terminate the ICA for this breach and to discontinue its provision of traffic transit and termination service to Halo, and grant all other necessary relief.[16]

These allegations are covered in Counts I through III of AT&T's Complaint, which conclude with a request that Halo be ordered to pay amounts owed under the ICA. In Count IV, AT&T alleges that "[p]ursuant to the ICA, Halo has ordered, and AT&T Tennessee has provided, transport facilities associated with interconnection with AT&T Tennessee."[17] AT&T further

[15] *Id.* at 3.
[16] *Id.* at 4-5.
[17] *Id.* at 6.

states that it "has billed Halo for this transport on a monthly basis pursuant to the ICA. Halo, however, has refused, with no lawful justification or excuse, to pay those bills."[18] Based on these allegations, AT&T "requests that the Authority declare that Halo must pay for the facilities it order from AT&T Tennessee."[19]

Halo's Motion to Dismiss

Halo has moved to dismiss Counts I, II, and III of the Complaint. In its Motion to Dismiss, Halo states:

> Halo is a commercial mobile radio service ("CMRS") provider. Halo has a valid and subsisting Radio Station Authorization ("RSA") from the Federal Communications Commission ("FCC") authorizing Halo to provide wireless service as a common carrier. AT&T has filed a complaint that it claims to be a post-ICA dispute. While the parties do have an ICA in Tennessee, Halo contends that AT&T's Counts I,II and III do not really seek and interpretation or enforcement of those terms. As explained further below, AT&T is impermissibly and improperly seeking to have the TRA decide whether Halo is acting within and consistent with its federal license. The TRA, however, lacks the jurisdiction and capacity to take up that topic.[20]

Halo further states:

> In addition, Halo sells CMRS-based telephone exchange service to Transcom Enhanced Services, Inc. ("Transcom"), Halo's high volume customer. As explained further below, AT&T's Counts I, II and III do not actually seek an interpretation or enforcement of the ICA terms. Instead, AT&T is impermissibly and improperly seeking to have the TRA decide whether Transcom is "really" an Enhanced/Information Service Provider, because if Transcom is an end user then there can be no dispute that the traffic in issue does "originate[ ] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The TRA, however, lacks the jurisdiction and capacity to take up the issue of whether Transcom is "really" an ESP because (1) AT&T is precluded as a matter of law from disputing Transcom's ESP status and (2) the issue is governed by federal law and only the FCC or a federal court may resolve it.

Halo offers the following in support of its claim that the TRA cannot exert jurisdiction over the complaint:

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[18] *Id.*
[19] *Id.*
[20] *Halo Wireless Inc.'s Partial Motion to Dismiss and Answer to the Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Tennessee*, p. 1 (December 1, 2011).

> On four separate occasions, courts of competent jurisdiction have ruled that Transcom is an Enhanced Service Provider ("ESP") *even for phone-to-phone calls* because Transcom changes the content of every call that passes through its system, often changes the form, and also offers enhanced capabilities (the "ESP rulings"). Copies of the ESP rulings have been attached to this submission as **Exhibits A-D.** The court directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network ("PSTN"); and (5) may instead purchase telephone exchange service just like any other end user.[21]

And Halo offers the following to argue that because it is providing service to a purported ESP, it is not in violation of its interconnection agreement with AT&T:

> Halo is selling CMRS-based telephone exchange service to an ESP End User. All of the communications at issue originate from end user wireless customer premises equipment ("CPE") (as defined in the Act, 47 U.S.C. § 153(14)) that is located in the same MTA as the terminating location. The bottom line is that not one minute of the relevant traffic is subject to access charges. It is all "reciprocal compensation" traffic and subject to the "local" charges in the ICA. Further, and equally important, the ICA uses a factoring approach that allocates as between "local" and "non-local." Halo has paid AT&T for termination applying the contract rate and using the contract factor, AT&T cannot complain.[22]

Halo states that AT&T "wants the TRA and other commissions across the country to rule that Halo's service is 'not wireless' and 'not CMRS.'"[23] However, Halo argues, only the Federal Communications Commission ("FCC") has jurisdiction to make such determinations:

> The courts have agreed that state commissions cannot attempt to impose rate or entry regulation on wireless providers, and in particular, state commissions cannot issue "cease and desist" orders on wireless providers. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.,* 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service Comm.,* 648 F.2d 1350 (5th Cir. 1981). Further, Halo has a *federally*-granted right to interconnect and the FCC has asserted "plenary" jurisdiction over CMRS interconnection and expressly pre-empted any state authority to deny interconnection. Declaratory Ruling, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, FCC 87-163, ¶¶12, 17, 2 FCC Rcd 2910, 2911-2912 (FCC 1987)("*RCC Interconnection Order*").
>
> . . .

[21] *Id.* at 2.
[22] *Id.* at 3.
[23] *Id.*

> The Supreme Court and several courts of appeals have consistently held that state commissions cannot undertake to interpret or enforce federal licenses because "a multitude of interpretations of the same certificate" will result. *See Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79 (1959). The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued. *Id.* At 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987) and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989). If a state commission or AT&T believes that the federally-licensed entity is engaging in some "scheme" or "subterfuge" through its practices, the proper forum is the FCC. Similarly, if any state commission has a concern, its remedy is to petition the federal licensing body for relief. *Service Storage*, 359 U.S. at 179. A state commission cannot take any action that would "amount to a suspension or revocation" of a federal license. *Castle, Attorney General v. Hayes Freight Lines*, 348 U.S. 61, 64 (1954).[24]

Halo also disputes the factual bases alleged in the Complaint:

> Contrary to AT&T's assertion in paragraph 7 of the Complaint, the traffic in issue *does* "originate[ ] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The network arrangement in every state and every MTA is the same. Halo has established a 3650 MHz base station in each MTA. Halo's customer has 3650 MHz wireless stations – which constitute CPE as defined in the Act – that are sufficiently proximate to the base station to establish a wireless link with the base station. When the customer wants to initiate a session, the customer originates a call using the wireless station that is handled by the base station, processed through Halo's network, and ultimately handed off to AT&T for termination or transit over the interconnection arrangements that are in place as a result of the various interconnection agreements ("ICAs").
>
> AT&T is apparently claiming that Halo is merely "re-originating" traffic and that the "true" end points are elsewhere on the PSTN. In making this argument, however, AT&T is advancing the exact position that the D.C. Circuit rejected in *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In that case, the D.C. Circuit held it did not matter that a call received by an ISP is instantaneously followed by the origination of a "further communication" that will then "continue to the ultimate destination" elsewhere. The Court held that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." In other words, the D.C. Circuit clearly recognizes – and functionally held – that an ESP is an "origination" and "termination" endpoint for intercarrier compensation purposes (as opposed to *jurisdictional* purposes, which does use the "end-to-end" test).
>
> The traffic here goes to Transcom where there is a "termination." Transcom then "originates" a "further communication" in the MTA. In the same way that ISP-bound traffic *from* the PSTN is immune from access charges

[24] *Id.* at 5-7.

(because it is not "carved out by § 251(g) and is covered by § 251(b)(5), the call *to* the PSTN is also immune.[25]

AT&T's Response

In response to the Motion to Dismiss, AT&T states that "AT&T Tennessee has come to the TRA because, as the evidence will show, Halo is engaged in conduct that Halo's ICA with AT&T Tennessee prohibits."[26] AT&T further states:

> The evidence will show that Halo's ICA prohibits Halo from delivering traffic that originates on wireline telephones, which makes sense given Halo's self-proclaimed status as a wireless carrier. Halo, however, has delivered large volumes of wireline-originated traffic to AT&T Tennessee, and it has attempted to disguise this traffic as wireless-originated traffic (by altering or withholding call-detail information). Halo's incentive for doing so is obvious – the charges for terminating the type of wireline-originated traffic that Halo actually sent are higher than the charges for terminating the wireless-originated traffic addressed by Halo's ICA. Halo's conduct, however, is prohibited by the ICA, and AT&T Tennessee is entitled to hold Halo in breach of the ICA.[27]

In response to Halo's argument based on the *Service Storage* case, AT&T states:

> Halo claims that AT&T Tennessee's complaint asks the TRA to construe licenses that only the FCC can construe. AT&T Tennessee's complaint does not ask the TRA to do any such thing. AT&T Tennessee's claims in no way depend upon the TRA finding or even considering whether Halo's actions violated its wireless licenses. Nothing in AT&T's complaint references Halo's FCC licenses, nor are those licenses in any way relevant to determining whether Halo breached its ICA (which was submitted to and approved by the Authority, not the FCC) by disguising wireline-originated traffic as wireless traffic. Thus, Halo's jurisdictional arguments rest on an inaccurate premise and are meritless.[28]

AT&T concludes:

> While AT&T Tennessee disagrees (and will present substantial evidence to prove its allegations), the dispute about whether the traffic is, or is not, wireline originated is a factual dispute. Factual disputes or factual denials are not a basis to dismiss a complaint. In fact, the existence of a factual dispute is precisely the reason that an evidentiary hearing is needed.[29]

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[25] *Id.* at 7-8.
[26] *AT&T Tennessee's Response to Halo's Partial Motion to Dismiss and Answer to Complaint*, pp. 1-2 (December 8, 2011).
[27] *Id.* at 1-2.
[28] *Id.* at 3.
[29] *Id.*

Discussion

"The sole purpose of a Tenn.R.Civ.P. 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint."[30] "[W]hen a complaint is tested by a Tenn.R.Civ.P. 12.02(6) motion to dismiss, [the tribunal] must take all the well-pleaded, material factual allegations as true, and [it] must construe the complaint liberally in the plaintiff's favor."[31] Taking "all the well-pleaded, material factual allegations" in the complaint "as true," the complaint raises claims that are squarely within the TRA's jurisdiction. The complaint seeks interpretation of an interconnection agreement that was approved by the TRA in Docket No. 10-00063 pursuant to 47 U.S.C. 252 and is subject to enforcement by the TRA.[32] Halo's protestations to the contrary are in complete conflict with the TRA's duties and authority under relevant law, as explained in detail in the District Court's November 1, 2011 Memorandum, and must be dismissed.[33] AT&T is entitled, if it can, to present evidence showing that the interconnection agreement between Halo and AT&T is being breached.

Halo also raises in this case an attempt to create an additional jurisdictional threshold based on the 1959 decision of the United States Supreme Court in *Service Storage & Transfer Co. v. Commonwealth of Virginia*[34] a case in which the Court considered a conflict between the Virginia State Corporation Commission's attempted exercise of jurisdiction over the intrastate truck traffic of a motor carrier and the fact that the carrier involved had been granted an interstate license by the Interstate Commerce Commission ("ICC"). For the reasons stated in the Hearing Officer's Order dismissing the motions to dismiss filed by Halo and its co-defendant in Docket

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[30] *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).
[31] *Id.*
[32] "The agreement [between Halo and AT&T] and amendment thereto are reviewable by the Authority pursuant to 47 U.S.C. § 252 and Tenn. Code Ann. §§ 65-4-104 (2004) and 65-4-124(a) and (b) (2004), or in the alternative, under Tenn. Code Ann. § 65-5-109(m) (2009)." *See In re: Petition for Approval of the Interconnection Agreement and Amendment Thereto between BellSouth d/b/a AT&T Tennessee and Halo Wireless, Inc.*, Docket No. 10-00063, *Order Approving the Interconnection Agreement and Amendment Thereto*, p. 2 (June 21, 2010).
[33] The District Court's Memorandum clearly reflects the fact that the District Court believes that the only posture in which this matter could come before it is *on appeal*, not by removal.
[34] *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959).

No. 00-00108, which is being issued contemporaneously herewith and which is incorporated herein by reference, Halo's reliance on *Service Storage* is without merit, and this case can go forward at the TRA under the limitations set by the Bankruptcy Court.

Accordingly, the Hearing Officer denies the Motion to Dismiss filed by Halo and sets this action for further proceedings in accordance with the attached procedural schedule.

IT IS THEREFORE ORDERED THAT:

1. The Motion to Dismiss filed by Halo Wireless, Inc. Services, Inc. is denied.

2. This matter shall proceed in accordance with the procedural schedule that is being issued simultaneously herewith.

IT IS SO ORDERED.

Kenneth C. Hill, Hearing Officer

EOD
10/26/2011

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	Chapter 11
	§	
Halo Wireless, Inc.,	§	Case No. 11-42464-btr-11
	§	
Debtor.	§	

ORDER GRANTING MOTION OF THE AT&T COMPANIES TO DETERMINE AUTOMATIC STAY INAPPLICABLE AND FOR RELIEF FROM THE AUTOMATIC STAY [DKT. NO. 13]

Upon consideration of the *Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and For Relief from the Automatic Stay* [Dkt. No. 13] (the "AT&T Motion")[1], and it appearing that proper notice of the AT&T Motion has been given to all necessary parties; and the Court, having considered the evidence and argument of counsel at the hearing on the AT&T Motion (the "Hearing"), and having made findings of fact and conclusions of law on the record of the Hearing which are incorporated herein for all purposes; it is therefore:

ORDERED that the AT&T Motion is GRANTED, but only as set forth hereinafter; and it is further

ORDERED that, pursuant to 11 U.S.C. §362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 (the "Automatic Stay") is not applicable to currently pending State Commission Proceedings[2], except as otherwise set forth herein; and it is further

ORDERED that, any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion

[1] The Court contemporaneously is entering separate orders granting *The Texas and Missouri Companies' Motion to Determine Automatic Stay Inapplicable and in the Alternative, for Relief From Same* [Dkt. No. 31] and the *Motion to Determine the Automatic Stay is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement* [Dkt. No. 44] filed by TDS Telecommunications Corporation.

[2] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

and a decision in respect of such regulatory matters may be rendered; *provided however*, that nothing herein shall permit, as part of such proceedings:

A. liquidation of the amount of any claim against the Debtor; or

B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor (collectively, the "Reserved Matters"); and it is further

ORDERED that nothing in this Order precludes the AT&T Companies[3] from seeking relief from the Automatic Stay in this Court to pursue the Reserved Matters once a state commission has (i) first determined that it has jurisdiction over the issues raised in the State Commission Proceeding; and (ii) then determined that the Debtor has violated applicable law over which the particular state commission has jurisdiction; and it is further

ORDERED that the AT&T Companies, as well as the Debtor, may appear and be heard, as may be required by a state commission in order to address the issues presented in the State Commission Proceedings; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from the implementation and/or interpretation of this Order.

Signed on 10/26/2011

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE

[3] The AT&T Companies include Southwestern Bell Telephone Company d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas; BellSouth Telecommunications, LLC d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee; Illinois Bell Telephone Company d/b/a AT&T Illinois; Indiana Bell Telephone Company Inc. d/b/a AT&T Indiana; Michigan Bell Telephone Company d/b/a AT&T Michigan; The Ohio Bell Telephone Company d/b/a AT&T Ohio; Wisconsin Bell Telephone, Inc. d/b/a AT&T Wisconsin; Pacific Bell Telephone Company d/b/a AT&T California; and Nevada Bell Telephone Company d/b/a AT&T Nevada.