

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:	:	
COMPLAINT OF	:	
CONCORD TELEPHONE EXCHANGE, INC.,	:	
HUMPHREYS COUNTY TELEPHONE,	:	
COMPANY, TELlico TELEPHONE	:	DOCKET NO. 11-00108
COMPANY, TENNESSEE TELEPHONE	:	
COMPANY, CROCKETT TELEPHONE	:	
COMPANY, INC., PEOPLES TELEPHONE	:	
COMPANY, WEST TENNESSEE	:	
TELEPHONE COMPANY, INC., NORTH	:	
CENTRAL TELEPHONE COOP., INC. AND	:	
HIGHLAND TELEPHONE COOPERATIVE,	:	
INC. AGAINST HALO WIRELESS,	:	
LLC, TRANSCOM ENHANCED SERVICES,	:	
INC AND OTHER AFFILIATES FOR	:	
FAILURE TO PAY TERMINATING	:	
INTRASTATE ACCESS CHARGES FOR	:	
TRAFFIC AND OTHER RELIEF AND	:	
AUTHORITY TO CEASE TERMINATION	:	
OF TRAFFIC	:	

REPLY TO OPPOSITION TO MOTION TO AMEND COMPLAINT

COMES NOW, Complainants, Concord Telephone Exchange, Inc., Humphreys County Telephone Company, Tellico Telephone Company and Tennessee Telephone Company; Crockett Telephone Company, Inc., Peoples Telephone Company, and West Tennessee Telephone Company, Inc.; Highland Telephone Cooperative, Inc.; and North Central Telephone Coop., Inc. (all collectively referred to as the “Rural Telephone Companies”, “Complainants” or the “RLECs”) in the above-styled docket, and file this Reply to Halo and Transcom Opposition to Amend Complaint, as follows:

A. INTRODUCTION

1. Halo and Transcom’s opposition to the amended complaint is in the nature of restating their objections to the TRA hearing in this case on jurisdictional grounds. This topic

has been fully covered in the context of their motions to dismiss and the answers submitted by the RLECs. Halo and Transcom are now further claiming that the requested relief is in violation of the Bankruptcy Court's Order of October 26, 2011, but only as to the relief requested, not the factual averments of the complaints, either original or amended, of the allegations that Halo and Transcom have violated Tennessee law. Indeed, Halo and Transcom have yet to answer the complaints on their merits, even while their "opposition" argues over what relief may be appropriate at the conclusion of the hearings in this case.

B. BACKGROUND

2. Halo's bankruptcy was filed in an attempt to evade the jurisdiction of the TRA by invoking the automatic stay provisions in the Bankruptcy Code, an interpretation rejected by the Bankruptcy Court Order of October 26, 2011.¹ Transcom is not a "debtor in bankruptcy" and, therefore, the automatic stay provision was never applicable to Transcom, the proposition with which the U.S. District Court (Tennessee Middle District) has agreed in remanding the "removal" which was improperly filed by Halo and Transcom in that Court. In doing so, Federal District Judge Campbell expressly agreed that the complaint before the TRA seeks to address to the application of Tennessee law to compensation due for intrastate traffic, a matter over which the TRA has original jurisdiction under the Tennessee Code.² Therefore, both Courts have agreed that this matter may proceed.

3. Halo opposed the Rural Companies' position before the Bankruptcy Court that the automatic stay provision did not apply. The Bankruptcy Court ruled that the states, specifically including the TRA, have clear "jurisdiction to determine their jurisdiction" and, further, to determine whether a violation of state law has occurred.

¹ Attached as Exhibit "___" to this Reply.

² Attached as Exhibit "___" to this Reply.

4. The Bankruptcy Court was specifically advised that the case before the TRA involves both money issues (intercarrier compensation) and issues regarding Halo and Transcom's lack of certification to operate in Tennessee in the first place. The Bankruptcy Court allowed that "any regulatory proceeding in respect to the matters described in the TDS Motion, including the TDS Proceedings [which included this TRA complaint], may be *advanced to a conclusion in a decision in respect of such regulatory matters as may be rendered...*" limiting the relief available in only two instances: the liquidation of damages and "any action that affects the debtor-creditor relationship." These two types of relief were help to be within the Bankruptcy Court's jurisdictions (and were nominated by the Bankruptcy Court as the "Reserve Matters"). The Bankruptcy Court did not limit the State's ability to enforce any violation of certification requirements, which concerns do not involve the liquidation of damages or "affect the debtor-creditor relationship."

C. STANDARDS FOR MOTION TO AMEND

5. Complaints have met the following standards for a motion to amend:

"In exercising its discretion, the trial court should consider several factors, including: (1) whether undue delay will occur as a result of the amendment, (2) whether the opposing party has sufficient notice, (3) whether the amending party is acting in bad faith, (4) whether the moving party has failed to cure deficiencies in previous amendments, whether the opposing party will suffer undue prejudice, and (5) the futility of the amendment. Gardiner v. Word, 731 S.W.2d 889, 891-92 (Tenn.1987); Merriman v. Smith, 559 S.W.2d 548, 559 (Tenn.Ct.App.1979). 'Of these factors, the most important is the proposed amendment's potential prejudice effect on the opposing party.'" Hardcastle, 170 S.W.3d at 81.

In the case sub judice, (1) there will not be undue delay, (2) opposing party has sufficient notice, (3) the amending party is acting in good faith, (4) there have been no previous amendments, opposing party will suffer no undue prejudice, and (5) the amendment is germane, valid and not futile.

Halo and Transcom will not be prejudiced by the amended complaints.

Furthermore, a plethora of cases illustrate the willingness of Tennessee courts to permit amendments under Rule 15.01. See e.g. Branch, 527 S.W.2d at 91; Matus v. Metropolitan Govt. of Nashville, 128 S.W.3d 653, 655 (Tenn. Ct. App. 2003) (“If the party opposing the amendment can be protected by the use of conditions from any possible prejudice that might result from the untimeliness of the amendment, there is no justifiable reason for not allowing it.”); HMF Trust v. Bankers Trust Co., 827 S.W.2d 296, 301 (Tenn. Ct. App. 1991) (“The case had not been set for trial, and granting of the motion to amend would not in any way delay the case or otherwise prejudice the defendants, except insofar as the claim itself might prevail. Under the circumstances of this case, we feel that the trial court erred in denying leave to amend.”); and Garthright v. First Tennessee Bank of Memphis, 728 S.W.2d 7, 9 (Tenn Ct. App. 1986) (“The case had not been set for trial, and to grant leave for defendants to amend their answer and rely upon the defense would not in any way delay the case or otherwise prejudice plaintiff except insofar as the defense itself might prevail. Under these circumstances, we feel that the trial court abused its discretion in denying leave to amend.”).

D. THE COMPLAINANTS’ MOTION SHOULD BE GRANTED

6. The amended complaint filed by the RLECs simply seeks to: a) add a count alleging that Transcom has been acting as a carrier of interstate toll traffic without certification;

and b) withdrawing the counts involving fraud, which, as Halo and Transcom previously pointed out, are properly raised in a Tennessee court of law, not before the TRA. The request to block traffic was contained in the original complaint and remains in the amended complaint. Thus, it was wrong for Halo and Transcom to argue that the complainants “have added new requests for relief...” This type of request for relief is of a type that would typically be found in a complaint of this type before the TRA and remained in the amended complaint without any attempt to somehow request that the TRA act on the limited “Reserve Matters” which the Bankruptcy Court held are in its original jurisdiction.

7. The jurisdictional objections of Halo and Transcom are well documented and have been previously addressed by the RLECs in their answers to the motions to dismiss filed by Halo and Transcom. Significantly, however, the FCC has held that there is no special billing rules applicable to Halo or Transcom, and that the same rules that have been in place for twenty-five years continue to apply to the industry generally and to Halo and Transcom specifically.

The FCC’s Order of November 18, 2011 is very clear that Halo’s traffic does not re-originate in the middle of a call when exchanged between Halo and Transcom customer using wireless spectrum.³ As the FCC describes:

First, one wireless service provider [Halo] claims that calls that it receives from other carriers, routes through its own base stations, and passes on to third-party carriers for termination have “originated” at its own base stations for purposes of applying the intraMTA rule. As explained below, we disagree.

³ *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report And Order And Further Notice Of Proposed Rulemaking released November 18, 2011 (“*FCC November 18th Order*”).

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.⁴

In other words, the FCC has agreed that Halo’s traffic has no special features such that the traditional compensation rules apply, including the “intraMTA” rule, apply. Whether Halo is a CMRS carrier or Transcom an ESP has no impact upon the rating of a call for intercarrier compensation purposes. The rules have always been applied on the basis of “the calling party initiating the call,” not Transcom’s enhancements in the middle of a call (whatever they may be), as the *FCC November 18th Order* confirms. Nor are Transcom and Halo, as “transiting carrier[s] ... considered the originating carrier[s].” Finally, Halo’s technology does not matter – *“a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call.”* These FCC rulings, affirming the basic rules of compensation, which include a clear intrastate component and the jurisdiction of the TRA, are those which Halo and Transcom does not want the TRA to hear.

Halo and Transcom, nevertheless, continue to maintain, implicitly if not explicitly, that the *FCC November 18th Order* is incorrect.

8-9. The TRA’s jurisdiction over intrastate calling is retained under the *FCC November 18th Order*. The FCC fully considered Halo’s claim to be an originating CMRS carrier and that of Transcom to be an ESP and rejected both.

10. The Bankruptcy Court ruling only restricts the Reserve Matters as described in Paragraph 4. The RLECs readily acknowledge these provisions and agree that the relief related

⁴ *FCC November 18th Order* at ¶¶ 979 and 1006 (emphasis added).

to the calculation of money damages and execution on those damages are to be implemented by the Bankruptcy Court.

11. Blocking of traffic under authority of State law is not prohibited by the FCC as described in the RLECs' Response to Halo's Motion to Dismiss.⁵

12. Again, the RLECs do not seek to liquidate or execute on any claim within the context of this TRA proceeding . These provisions are from the original complaint and the Bankruptcy Court was well aware of them at the time it ruled.

13. The Bankruptcy Court has clearly agreed with the RLECs that the TRA may determine:

- (a) whether it has jurisdiction over the subject matter of this complaint; and
- (b) whether there has been a violation of State law.

The TRA's ability to find that the amounts due and to enforce that judgment (i.e., liquidate the damages) is reserved to the Bankruptcy Court. There is no such restriction expressed by the Bankruptcy Court, however, on the TRA's enforcement of certification violations of State law. The TRA may order the Halo and/or Transcom cease operations if they have been found to be operating without the requisite authorization. In any event, the RLECs urge the TRA to move forward at the hearing phase of this case and, then, address the appropriate remedies consistent with the Bankruptcy Court's limitation regarding money damages and the TRA's determination of the violations of Tennessee law committed by Halo and Transcom.

⁵ See Section E, p. 20.

CONCLUSION

WHEREFORE, the RLECs request that the TRA permit their Complaint to be amended, consistent this Reply and proceed to hearings on this matter.

This 8th day of December, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. LaDon Baltimore", is written over a horizontal line.

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CERTIFICATE OF SERVICE


I certify that I have this day served a copy of the foregoing REPLY upon the following persons by causing electronic copies of the same to be transmitted to each interested party that has supplied a valid email address, and all other parties to be served via first class mail with adequate postage affixed thereon and deposited in the United States Mail addressed as follows:

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This 8th day of December, 2011.


H. LaDon Baltimore