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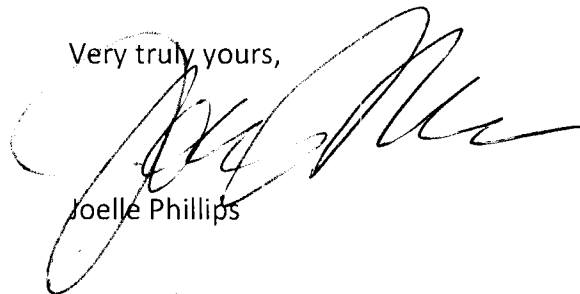
Hon. Kenneth C. Hill, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of BellSouth Telecommunications, Inc. dba AT&T Tennessee v. Halo Wireless, Inc.*
Docket No. 11-00119

Dear Chairman Hill:

Enclosed are the original and four copies of AT&T Tennessee's *Response to Halo Wireless, Inc.'s Motion to Dismiss with Prejudice*.

Very truly yours,



Joelle Phillips

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *BellSouth Telecommunications, LLC dba AT&T Tennessee v. Halo Wireless, Inc.*

Docket No. 11-00119

BELLSOUTH TELECOMMUNICATIONS, LLC DBA AT&T TENNESSEE'S
RESPONSE TO HALO WIRELESS, INC.'S
MOTION TO DISMISS COMPLAINT WITH PREJUDICE

BellSouth Telecommunications, LLC dba AT&T Tennessee (“AT&T Tennessee”) hereby submits its response to Halo Wireless, Inc.’s (“Halo”) January 13, 2012 motion to dismiss (“Second Motion to Dismiss”) and states as follows:

Halo’s latest Motion to Dismiss is flatly at odds with the FCC’s *Connect America Order*. Halo’s Motion is one more attempt to divert this Authority from the FCC’s decision – a decision which is squarely on point because it addressed and rejected the very argument being advanced, by the very party who is trying to advance it here. Halo’s Motion - along with the stacks of unrelated and out-dated cases it asked the Authority to review during the hearing – is nothing more than an attempt to distract from the fact that *Halo’s defense rests on an argument that the FCC has considered and flatly rejected in paragraphs 1005 and 1006 of the Connect America Order.*

Halo's Second Motion to Dismiss – indeed, Halo's entire defense in this case¹ – depends on the following, daisy-chained arguments:

1. Transcom, which sends Halo all the traffic that Halo delivers to AT&T Tennessee, is an enhanced service provider ("ESP").
2. As an ESP, Transcom is not required to pay access charges, but instead is required only to pay end user charges.
3. Therefore, Transcom is an end user.
4. Since Transcom is an end user, calls terminate to Transcom and originate with Transcom.
5. Therefore, a call from California to Nashville that is routed in the manner depicted in hearing Exhibit 2 terminates with Transcom, which then wirelessly originates a further communication, which passes through Halo and then to AT&T Tennessee in the same MTA as Transcom.
6. Thus, the call that AT&T Tennessee receives from Halo originated wirelessly, with Transcom, and Halo is not breaching its contract with AT&T Tennessee.

Halo strings these assertions together and represents that the May 26, 2006 bankruptcy order on which the Second Motion to Dismiss relies, as well as three other bankruptcy court orders, support that theory. That simply is not so. The bankruptcy judges held *only* that Transcom is an ESP and therefore does not have to pay access charges, but instead pays only end user charges.² None of the four bankruptcy court orders states or suggests that Transcom actually *is* an end user, and none of them says or implies *anything* about the termination or origination of calls.

Nor has the FCC ever ruled that an ESP is an end user. On the contrary, the law is clear that the FCC's "ESP Exemption" is a narrowly crafted legal fiction that merely allows ESPs to

¹ Halo's defense to the facilities charge claim is apparently unrelated to this theory – but it does appear to be based upon yet another Halo theory about how it should be excused from its contractual obligations to pay for what it receives from AT&T.

² AT&T Tennessee does not agree that Transcom is an ESP, and the evidence of record does not establish that it is, but it makes no difference if Transcom is an ESP, for reasons discussed in the text.

be treated *as if* they were end users, in some circumstances, by not having to pay access charges.³ The FCC has never held, as Halo would have this Authority hold, that this means an ESP “originates” calls that in fact began several states away. Indeed, if ESPs actually were end users that originate and terminate calls, there would be no need for the ESP Exemption; instead of adopting the exemption, the FCC would simply have ruled that ESPs are end users, from which it would follow that they cannot be subject to access charges.

Halo claims it wants the Authority to apply existing law, but it is asking the Authority to dramatically change the law. Halo’s theory has never been adopted or approved.⁴ To the contrary, the FCC addressed Halo’s argument that all calls come to it through an ESP located in the same MTA as Halo, and therefore are wireless intraMTA calls, and flatly rejected it. *Connect America Fund*, FCC 11-161, 2011 WL 5844975, at ¶¶ 1003-06 (rel. Nov. 18, 2011) (“*Connect America Order*”).

The bankruptcy decisions that Halo cites have no bearing here. Those cases state that Transcom is an ESP and is therefore to be treated as an end-user for purposes of not paying access charges.⁵ As a legal matter, none of those decisions is binding on AT&T Tennessee or the Authority,⁶ but the important point is that the decisions cases do *not* say that Transcom is an

³ See Pre-hearing Memorandum of BellSouth Telecommunications, LLC d/b/a AT&T Tennessee, at 8.

⁴ At the evidentiary hearing, Halo submitted a stack of decisions, many of which were never cited in any of its briefs or testimony, and claimed they supported its theory that an ESP must be deemed to originate every call it touches. Those cases say no such thing. Indeed, they are so far afield from this case that it is difficult to understand how Halo thought they were relevant. The only authority to have addressed Halo’s specific “origination” argument is the FCC, which rejected it.

⁵ See Second Motion to Dismiss, Ex. A at 12 (stating that Transcom’s service “is an enhanced service, not subject to payment of access charges”); *id.*, Ex. D at ¶ 4 (Transcom’s “services are not subject to access charges”).

⁶ Halo claims that the bankruptcy decisions have *res judicata* or collateral estoppel effect on AT&T Tennessee here. The Authority necessarily rejected that argument when Halo made it in its first motion to dismiss (at ¶¶ 2-3). Moreover, *res judicata* or collateral estoppel cannot apply because, among other things, (i) the main order Halo relies on was vacated by the district court (Second Motion to Dismiss, Ex. F), (ii) the bankruptcy cases involved Transcom, not Halo, and therefore were not between identical parties, (iii) the bankruptcy cases did not

end user or is to be treated as an end-user for all purposes and, in particular, do *not* say that Transcom originates or re-originates calls. Rather, an ESP is treated as an end-user for the purpose of being exempted from access charges, nothing more.⁷ That is why it is called the ESP access-charge “exemption.” Nor does the ESP status, or exemption, pass from the ESP to the carrier that serves it.⁸ Thus, Halo could not claim to be an ESP – or to be exempt from access charges – in any event.

Halo’s only defense on the “wireless origination” and Charge Number issues in this case is its claim that Transcom should be deemed to originate or re-originate every call that passes through it. Because none of the bankruptcy decisions that Halo cites addresses that issue, they are irrelevant here. **The only case that has addressed that issue is the FCC’s Connect America Order, which rejected Halo’s very same argument.** *Connect America Order*, ¶¶ 1005-06.

involve the same cause of action as this case, since this case involves claims for Halo’s breach of a contract that was not even formed until after the bankruptcy cases, while the bankruptcy cases involved the issue of whether Transcom was subject to access charges, and (iv) the issue in this case (whether Transcom must be deemed to originate or re-originate every call it touches, and transforms the calls from landline to wireless) was never even raised, much less decided, in the bankruptcy decisions.

⁷ *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); *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987), *vacated as moot*, 7 FCC Rcd. 5644 (1992) (“*Northwestern Bell Order*”).

⁸ *Northwestern Bell*, 2 FCC Rcd. 5986 at ¶ 2; *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 22, 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); *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”); *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 (Kan. Corp. Comm’n 2005) (“the [ESP] exemption applies to the information service provider, not to carriers . . . that provide service to ESPs and other customers”).

Halo's latest Motion, like its previous motions, is nothing more than an effort to get a different answer from the TRA than it received from the FCC.

Respectfully submitted,

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dba AT&T Tennessee

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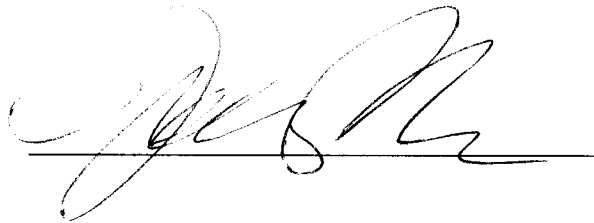
Attorneys for AT&T Tennessee

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2012, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
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- ☒ Electronic

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A handwritten signature in black ink, appearing to read "Paul Davidson", is written over a horizontal line.