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VIA HAND DELIVERY

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

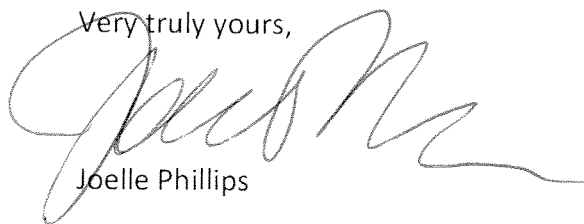
Re: *Complaint of BellSouth Telecommunications, Inc. dba AT&T Tennessee v. Halo Wireless, Inc.*

Docket No. 11-00119

Dear Chairman Hill:

Enclosed are the original and four copies of AT&T's *Response to Halo's Partial Motion to Dismiss and Answer to Complaint* in the referenced matter.

Very truly yours,



Joelle Phillips

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 11-00119

**AT&T TENNESSEE'S RESPONSE TO HALO'S PARTIAL MOTION
TO DISMISS AND ANSWER TO COMPLAINT**

Comes now, BellSouth Telecommunications, LLC dba AT&T Tennessee ("AT&T Tennessee") and in response to Halo Wireless, Inc.'s ("Halo") *Partial Motion to Dismiss and Answer to Complaint* ("Motion"), states as follows:

Overview of Case

This case is far more straightforward than Halo is willing to concede. In fact, this type of complaint – a complaint between carriers about an interconnection agreement (ICA) – is a common occurrence at the TRA.

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. Both Tennessee state law and federal telecommunications law are abundantly clear regarding where to go for relief when an ICA has been breached -- state commissions like the TRA have original jurisdiction to decide cases like this one.¹

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,

¹ The legal authority for this point is well settled. See, e.g., *Michigan Bell Tel. Co. v. MCI Metro Access Trans. Servs., Inc.*, 323 F.3d 348, 362-63 (6th Cir. 2003); *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278-81 (5th Cir. 2010); *Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703, 708, 713 (8th Cir. 2006); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003); *Sw. Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 485 (5th Cir. 2000); *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999); *In the Matter of Starpower Commc'ns*, 15 FCC Rcd. 11277, at ¶ 7 (FCC, 2000).

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.² Halo's conduct, however, is prohibited by the ICA, and AT&T Tennessee is entitled to hold Halo in breach of the ICA.

This case presents the TRA with straight-forward questions: the factual question of whether AT&T Tennessee is correct that Halo sent large volumes of wireline originated traffic and, if so, the legal question of whether Halo breached the ICA by doing so.

Argument

Halo's various arguments for dismissing this case fall into three categories:

Arguments about the Effect of the Bankruptcy Case. Halo argues that its pending bankruptcy case presents some legal basis to stop the TRA from acting on this complaint. But the bankruptcy court already ruled that the bankruptcy proceeding does not stay this case, and the TRA already rejected these very arguments when it unanimously voted to deny Halo's abatement motion on November 21, 2011. In fact, since the ruling was issued by the bankruptcy court, three more federal courts have rejected Halo's arguments and found that state commissions have jurisdiction over AT&T ILECs' ICA complaints against Halo.³ Not one federal court has agreed with Halo's arguments. Instead, each federal court that has addressed the issue has agreed that cases, such as this one, should proceed in the state commissions.

² Halo was free to negotiate an ICA for the purpose of delivering wireline originated traffic to AT&T Tennessee. However, had Halo done so (and admitted the true nature of the traffic), then Halo would have had to also admit that the applicable charge for terminating such traffic would be the higher charge for switched access – not the less expensive reciprocal compensation rates applicable to intraMTA wireless originated traffic. Halo's actions are simply an unlawful scheme to avoid paying the applicable price for terminating traffic.

³ Memorandum, *BellSouth Telecommc'ns, Inc. v. Halo Wireless, Inc.*, No. 3-11-0975 (M.D. Tenn., Nov. 1, 2011); Order Granting Motion to Remand, *BellSouth Telecommc'ns, LLC v. Halo Wireless, Inc.*, C/A No. 11-80162-dd (Bankr. D. S.C., Nov. 30, 2011); Order Denying Emergency Motion for Stay Pending Appeal, *In re: Halo Wireless, Inc., Halo Wireless, Inc. v. Sw. Bell Tel. Co.*, Case No. 4:11-mc-55 (E.D. Tex., Nov. 30, 2011).

Arguments about TRA and FCC Jurisdiction. 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.

Arguments about the Facts. Finally, Halo denies AT&T Tennessee's factual allegations – both the allegation that the traffic it has sent to AT&T was originated on wireline telephones and the allegation that Halo has disguised the traffic so that it will appear to be wireless originated. 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.⁴ In fact, the existence of a factual dispute is precisely the reason that an evidentiary hearing is needed.

Halo has spent months engaged in a nationwide effort, waged in federal courts from Tennessee to Texas, trying desperately to avoid having a state commission rule on whether it is breaching its interconnection agreements. It is not hard to guess why Halo would rather these matters be decided in another forum – such as a federal court (where the judge has no specialized familiarity with

⁴ Tennessee law, like the law in every state, establishes that cases are not appropriate for dispositive motions where relevant fact issues are disputed. This is true whether the motion is a motion to dismiss or a summary judgment motion. See *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999) (noting that motion to dismiss tests the legal sufficiency of the plaintiff's complaint and not strength of the plaintiff's evidence); *Penley v. Honda Motor Corp.*, 31 S.W.3d 181, 183 (Tenn. 2000) (noting that summary judgment is appropriate only when moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as matter of law). The TRA's own rules similarly make clear that mere denial of factual allegations is not a proper basis for a motion to dismiss. See Tenn. Comp. R. & Regs. R. 1220-1-2-.03 (setting forth bases for motion to dismiss).

telecommunications law) or the FCC (where it could take additional time for the matter to be concluded and no 180-day time limit applies).

Halo's delay strategy faces two overwhelming hurdles. First, the bankruptcy court (in addition to every other federal court to have taken up the matter to date) has rejected Halo's argument that cases such as this one should be brought in some forum other than state commissions. The bankruptcy court ruled that the automatic stay in bankruptcy does not apply to commission proceedings such as this. That decision still stands because both the bankruptcy court and the federal district court denied Halo's request for a stay pending appeal to the 5th Circuit Court of Appeals – an appeal that Halo did not even file with the 5th Circuit Court of Appeals until six weeks after the bankruptcy court issued its order on October 26. As a result, Halo's improper attempts at litigating this matter in federal court have been thwarted.⁵

Next, Halo's alternate strategy for delaying this matter in a lengthy FCC proceeding is not only unlawful (because state commissions must decide ICA disputes in the first instance) but also pointless. The FCC has recently rejected Halo's argument that the traffic at issue is wireless traffic, and instead reaffirmed that the type of traffic Halo is delivering to AT&T is actually wireline-originated traffic.⁶

⁵ 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) (holding that automatic bankruptcy stay did not apply to AT&T ILEC's complaints against Halo in state commissions); Order Denying Motions for Stay Pending Appeal, *In re: Halo Wireless, Inc.*, Case No. 11-42464 (Bankr. E.D. Tex., Nov. 1, 2011) (refusing to stay ruling pending appeal); Memorandum, *BellSouth Telecommc'ns, Inc. v. Halo Wireless, Inc.*, No. 3-11-0975 (M.D. Tenn., Nov. 1, 2011) (remanding AT&T Tennessee's complaint to TRA); Order Granting Motion to Remand, *BellSouth Telecommc'ns, LLC v. Halo Wireless, Inc.*, C/A No. 11-80162-dd (Bankr. D. S.C., Nov. 30, 2011) (remanding AT&T South Carolina's complaint against Halo to state commission); Order Denying Emergency Motion for Stay Pending Appeal, *In re: Halo Wireless, Inc., Halo Wireless, Inc. v. Sw. Bell Tel. Co.*, Case No. 4:11-mc-55 (E.D. Tex., Nov. 30, 2011) (refusing to stay bankruptcy court's ruling that the stay is inapplicable).

⁶ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.*, FCC 11-161, 2011 WL 5844975 at ¶¶ 1005-06 (rel. Nov. 18, 2011) (singling out Halo by name and squarely rejecting Halo's theory that Halo can "re-originate" calls and convert them from wireline to CMRS; FCC holds that such calls are *not* CMRS-originated for purposes of intercarrier compensation). See also transcript of November 21, 2011 TRA status conference in Halo I at p 26, in which counsel for Halo concedes that the FCC "disagreed with Halo" and goes on to explain that Halo contends that the FCC was simply "incorrect in the way they addressed it."

Indeed, the FCC specifically references Halo in explaining that Halo's scheme is unlawful.⁷ Thus, the FCC has underscored, in plain language, that Halo's argument has no merit – Halo cannot magically transform a wireline call into a wireless call by "re-originating" that traffic.

These developments have left Halo grasping at straws, relying on arguments about affiliated entities who are not parties to this case (*e.g.*, Transcom) – another Halo argument the FCC also considered and rejected⁸, citing to orders about matters not relevant to this docket, and talking about FCC licenses that are not even mentioned in AT&T Tennessee's complaint. These arguments present no basis for this case to be dismissed. Instead, the case should proceed on the schedule that Chairman Hill established with the parties' input at the recent status conference. This docket has been pending for months due to Halo's various delay tactics, and it is time for Halo to stop running from this forum. The TRA, like other state commissions, has the jurisdiction and the expertise to address these issues, and it is time to do precisely that.

Conclusion

The TRA should reject Halo's Partial Motion to Dismiss and proceed with the hearings already scheduled.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.
dba AT&T Tennessee

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⁷ *Connect America Fund*, ¶¶ 1005-06.

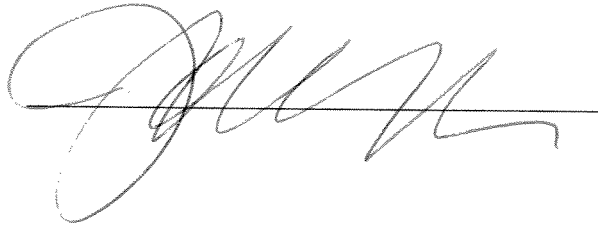
⁸ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, a copy of the foregoing document was served on the following, via the method indicated:

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

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