

Eric Fryson

From: Dana Greene [DanaG@hgslaw.com]
Sent: Thursday, June 07, 2012 2:00 PM
To: Filings@psc.state.fl.us
Cc: thatch@att.com; Larry Harris; Gary Perko
Subject: Docket 110234-TP - Halo Wireless, Inc.'s Prehearing Statement
Attachments: Docket No. 110234-TP - Halo Wireless Inc.s Prehearing Statement.doc
Electronic Filing

a. Person responsible for this electronic filing:

Gary V. Perko
Hopping Green & Sams, P.A.
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
(850)425-2359
gperko@hgslaw.com

b. Docket No. 110234-TP

In re: Bellsouth Telecommunications, LLC d/b/a AT&T Florida v. Halo Wireless, Inc.

c. Document being filed on behalf of Halo Wireless, Inc.

d. There are a total of 11 pages.

e. The document attached for electronic filing is Halo Wireless, Inc.'s Prehearing Statement.

Thank you for your cooperation.

Dana Greene, Legal Assistant to
Gary V. Perko, D. Kent Safriet,
& Jacob T. Cremer
Hopping Green & Sams, P.A.
119 S. Monroe Street, Ste. 300 (32301)
P.O. Box 6526
Tallahassee, Florida 32314
850-425-3437 (direct)
850-224-8551 (fax)
danag@hgslaw.com

DOCUMENT NUMBER-DATE

03737 JUN-7 2012

FPSC-COMMISSION CLERK

6/7/2012

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition for relief against Halo Wireless, Inc. for breaching the terms of the wireless interconnection agreement, by BellSouth Telecommunications, LLC d/b/a AT&T Florida.

DOCKET NO. 110234-TP

FILED: JUNE 7, 2012

**HALO WIRELESS, INC.'S
PREHEARING STATEMENT**

Pursuant to the requirements of the Order Establishing Procedure (Order No. PSC-12-0202-PCO-TP) issued on April 13, 2012, Halo Wireless, Inc. ("Halo") hereby submits its Prehearing Statement.

- (1) The name of all known witnesses whose testimony has been prefiled or who may be called by the party, along with subject matter of each such witness' testimony;

The list below includes the name of all known witnesses whose testimony has been prefiled by Halo or who may be called by Halo, and also an identification of the issue and subject matter on which the witness may testify.

| <u>Witness</u> | <u>Issues</u> | <u>Subject Matter</u> |
|----------------|---------------|---|
| Russ Wiseman | 2-7 | Halo's Business Model; Halo's Service; the Nature of Halo's Traffic; Halo's Call Signaling Practices; the FCC Rulemaking Order; Facilities Charges |
| Robert Johnson | 2, 3 | Transcom's Status as an End User and an ESP; the Nature of Transcom's Traffic; Transcom's Change in Content; the Use of CPE; the FCC Rulemaking Order Halo's Call Signaling Practices |

- (2) A description of all prefiled exhibits and other exhibits that may be used by the party in presenting its direct case (including individual components of a composite exhibit) and the witness sponsoring each;

| <u>Witness</u> | <u>Exhibit(s)</u> | <u>Description</u> |
|----------------|-------------------|--|
| Russ Wiseman | RW-1 | Correspondence with FCC re <i>Connect America Fund</i> |
| | RW-2 | Correspondence with AT&T's Randy Ham |
| Robert Johnson | RJ-1 | <i>In re Transcom Enhanced Services, LLC</i> , Bankr. N.D. Tex., Memorandum Opinion re Transcom's Status as an Enhanced Service Provider, April 29, 2005 |
| | RJ-2 | <i>In re Transcom Enhanced Services, LLC</i> , Bankr. N.D. Tex., Order Confirming Debtor's and First Capital's Original Joint Plan of Reorganization, May 16, 2006 |
| | RJ-3 | <i>In re Transcom Enhanced Services, LLC</i> , Bankr. N.D. Tex., Order Granting Transcom's Motion for Partial Summary Judgment Based on the Affirmative Defense that Transcom Qualifies as an Enhanced Service Provider, September 20, 2007 |
| | RJ-4 | <i>In re Transcom Enhanced Services, LLC</i> , Bankr. N.D. Tex., Order Granting Motion for Entry of Orders (i) Authorizing and Approving Sale of Substantially All Assets Free and Clear of Liens, Claims, Encumbrances, Interests and Exempt from Any |

- (3) A statement of the party's basic position in the proceeding;

Halo is not in breach of the interconnection agreement ("ICA"). Halo provides commercial mobile radio service ("CMRS") and it sells telephone exchange service to Transcom Enhanced Services, Inc. ("Transcom") – Halo's high volume customer. On several occasions, courts of competent jurisdiction have ruled that Transcom is an end user and an enhanced service provider ("ESP") *even for phone-to-phone calls* because Transcom changes the content of every call that passes through its system and also offers enhanced capabilities. The courts ruled that Transcom is an end user, not a carrier. Accordingly, as a CMRS, Halo is selling telephone exchange service to an ESP end user. All such calls received from Transcom within any particular MTA are terminated in that same MTA. The bottom line is that not one minute of the relevant traffic is subject to access charges.

Further, prior to December 29, 2011, Halo inserted the billing telephone number of its high volume customer into the Charge Number information. Halo provided this information in order to identify the party financially responsible for the calls passing over its egress trunks going to/from AT&T. The call detail information provided by Halo did not prevent AT&T from being able to properly bill Halo. To the contrary, billing for Halo traffic is based, according to the ICAs, on traffic factors negotiated between the parties, not "call-by-call" rating. Additionally, the calling parameters AT&T would like to use for call rating were provided unaltered, enabling them to derive traffic factors they could have used to change the factors already in place. And finally, consistent with the court decisions ruling that Halo's high volume customer is an end user and an ESP, the call detail information that was provided accurately portrayed the traffic as intraMTA, and subject to the "local" charges in the ICA.

AT&T's argument that Halo is in breach of the ICA because Halo has not paid AT&T for facilities is without any foundation in the ICA and must be denied. Per the terms of the ICA, AT&T cannot shift cost responsibility to Halo for facilities charges on AT&T's side of the point of interconnection ("POI").

In sum, there is no valid basis for the Complaint. The relevant traffic is not subject to access charges, Halo has not signaled incorrect call detail information, Halo does not owe AT&T for facilities charges, and therefore, AT&T is not entitled to the relief it requests.

- (4) A statement of each question of fact, question of law, and policy question that the party considers at issue, along with the party's position on each issue, and, where applicable, the names of the party's witness(es) who will address each issue. Parties who wish to maintain "no position at this time" on any particular issue or issues should refer to the requirements of subsection C, below;

Does the Commission have jurisdiction to address AT&T Florida's Complaint?

The underlying dispute is controlled by federal law, which therefore preempts any state disposition of these issues. The FCC has made it clear that decisions affecting federal telecom licensees like Halo, and their services, are not entrusted to the state commissions because doing so is impractical and would make deployment of nationwide wireless systems like Halo's "virtually impossible." 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. 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.

The regulatory classifications for Halo and Transcom are defined and governed exclusively by *federal* law. For example, the ESP rulings hold that Transcom is *not* a carrier, is *not* an interexchange carrier ("IXC"), and its traffic is *not* subject to access charges. These rulings hold, instead, that Transcom is an ESP and therefore an "end user" and is entitled to obtain "telephone exchange service" as an end user rather than "exchange access" as an IXC. CMRS carriers – like Halo here – predominately provide "telephone exchange service" to end users. States are pre-empted from imposing rate or entry regulation on CMRS. Nor can states or local governmental authorities take action that will "prohibit or have the effect of prohibiting the provision of personal wireless services." The FCC has *exclusive* jurisdiction over wireless licensing, market entry by private and commercial wireless service providers and the rates charged for wireless services.

The Supreme Court and several courts of appeals have consistently held that state commissions cannot undertake to interpret or enforce federal licenses. 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. If a state commission or AT&T believe 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. A state commission cannot take any action that would "amount to a suspension or revocation" of a federal license.

Has Halo delivered traffic to AT&T Florida that was not “originated through wireless transmitting and receiving facilities” as provided by the parties’ ICA?

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 ICAs.

The traffic here goes to Transcom where there is a “termination.” Transcom then “originates” a “further communication” in the MTA. Enhanced services were defined long before there was a public Internet. ESPs do far more than just hook up “modems” and receive calls. They provide a wide set of services and many of them involve calls to the PSTN. The FCC observed in the first decision that created what is now known as the “ESP Exemption” that ESP use of the PSTN resembles that of the “leaky PBXs” that existed then and continue to exist today, albeit using much different technology. Even though the call started somewhere else, as a matter of law a Leaky PBX is still deemed to “originate” the call that then terminates on the PSTN. As noted, the FCC has expressly recognized the bidirectional nature of ESP traffic, when it observed that ESPs “may use incumbent LEC facilities to originate and terminate interstate calls.” Halo’s and Transcom’s position is simply the direct product of Congress’ choice to codify the ESP Exemption, and neither the FCC nor state commissions may overrule the statute.

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)). The FCC’s holding in ¶ 1006 of the *Connect America* order relates only to whether the traffic is subject to the “intraMTA rule” and does not constitute a holding that there is not an origination for other purposes. Regardless, the same paragraphs find that Halo is providing “transit” and ¶ 1331 goes on to characterize transit as “non-access”; therefore, AT&T cannot impose exchange access charges because that would violate FCC rule 20.11(d). 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.

Russ Wiseman and Robert Johnson have provided pre-filed testimony on this issue and likely will provide live testimony on this issue at the hearing on the merits, as well.

Is Halo a CMRS provider?

Halo is a commercial mobile radio service (“CMRS”) provider. Halo has a valid and subsisting Radio Station Authorization (“RSA”) from the FCC authorizing Halo to provide wireless service as a common carrier.

Is Transcom an ESP and an end user?

Halo’s “High Volume” customer whose traffic is at issue is Transcom. Transcom and AT&T were directly involved in litigation, and the court twice held – over AT&T’s strong opposition – that Transcom is an ESP and end user, is not a carrier, and access charges do not apply to Transcom’s traffic. This specific set of rulings was incorporated into the Confirmation Order in Transcom’s bankruptcy case. AT&T was a party and is bound by these holdings. AT&T is barred from raising any claim that Transcom is anything other than an ESP and end user qualified to purchase telephone exchange service from carriers, and cannot now collaterally attack the bankruptcy court rulings. Transcom’s status as an end user is not subject to debate.

Once it is clear that Transcom is Halo’s telephone exchange service end user customer, then all of AT&T’s contentions simply fail. End users originate calls. The calls at issue are “end user” calls, so AT&T’s assertions are flatly incorrect and the claim is based on the impermissible and incorrect premise that Halo’s customers are not “end users” purchasing telephone exchange service in the MTA.

Russ Wiseman and Robert Johnson have provided pre-filed testimony on this issue and likely will provide live testimony on this issue at the hearing on the merits, as well.

Is Transcom a carrier?

The Telecommunications Act makes it clear that providers of information services or enhanced services (“ESPs”) are not telecommunications carriers and are, instead, end users of telecommunications services. The FCC’s view of the telecommunications world is divided into two camps: the telecommunications carriers that provide telecommunications services and the end users who consume them. Under the FCC’s view, end users use customer premise equipment (“CPE”) to “originate” telecommunications to telecommunications carriers and telecommunications carriers “terminate” telecommunications to end users’ CPE. Transcom’s wireless transmitting and receiving facilities are CPE. On several occasions, Transcom has been ruled an ESP and an end user; and specifically, it has been ruled that Transcom is not a carrier.

Even if Transcom is not an ESP, it is not a common carrier. Any entity that is not a carrier is an end user. End users cannot be required to pay “carrier’s carrier” (switched access) charges.

Russ Wiseman and Robert Johnson have provided pre-filed testimony on this issue and likely will provide live testimony on this issue at the hearing on the merits, as well.

Has Halo complied with the signaling requirements in the parties' ICA?

Prior to December 29, 2011, Halo inserted the billing telephone number of its high volume customer, Transcom, into the Charge Number information. Halo provided this information in order to identify the party financially responsible for the calls passing over its egress trunks going to/from AT&T. The call detail information provided by Halo did not prevent AT&T from being able to properly bill Halo. To the contrary, billing for Halo traffic is based, according to the ICAs, on traffic factors negotiated between the parties, not "call-by-call" rating. Additionally, the calling parameters AT&T would like to use for call rating were provided unaltered, enabling them to derive traffic factors they could have used to change the factors already in place. And finally, consistent with the court decisions ruling that Halo's high volume customer is an end user and an ESP, the call detail information that was provided accurately portrayed the traffic as intraMTA, and subject to the "local" charges in the ICA.

Russ Wiseman and Robert Johnson have provided pre-filed testimony on this issue and likely will provide live testimony on this issue at the hearing on the merits, as well.

Has halo failed to pay AT&T Florida for facilities that AT&T Florida provided pursuant to the parties' ICA and that the ICA obliges Halo to pay for?

Under the ICA, AT&T may only charge for interconnection "facilities" when AT&T-provided "facilities" are used by Halo to reach the mutually-agreed POI.

The architecture in place is as follows: Halo obtains transmission from its network to AT&T tandem buildings from third party service providers. In the vast majority of locations, the third party service provider has transport facilities and equipment in the tandem building, either in a "meet me room" area or via collocation facilities purchased from AT&T. In all Florida markets, except in Miami, Halo has secured third party transport all the way up to the mutually-agreed POI. The third party transport provider will have a collocation arrangement in the AT&T Florida tandem.

As part of its third party provided transport arrangements, Halo secures a Letter of Agency/Channel Facility Assignment ("LOA/CFA") from its third party transport service provider. The CFA portion of the LOA/CFA document consists of an Access Customer Terminal Location ("ACTL"), the third party provider's circuit ID, and a specific channel facility assignment (at the DS-3 or DS-1 level depending on the arrangements) on the third party's existing transport facilities. This CFA defines the specific rack, panel and jack locations at Halo's third party transport providers' digital signal cross-connect ("DSX") where Halo and AT&T meet to exchange traffic. In other words, the mutually-agreed POI between AT&T and Halo is located where AT&T "plugs in" its network on the DSX panel where the CFA is given to Halo by the third party transport provider. This is memorialized

by the fact that each POI will have a POI Common Language Location Identifier (“CLLI”) code, and the CLLI code corresponds exactly to the CFA location.

In order to implement interconnection, AT&T has to install *cross-connects* that go to the POI at the third party transport providers DSX that is inside the tandem building so that the parties can exchange traffic. AT&T has wrongly chosen to call these cross-connects “channel terminations” and is attempting to bill Halo out of the access tariff for these cross-connects even though they are on AT&T’s side of the POI. AT&T is also charging Halo for certain multiplexing (DS3/DS1, and DS1/DS0).

The DS-3 to DS-1 muxing/demuxing is done purely for AT&T’s convenience; Halo was and is at all times prepared to support DS3 physical layer capability all the way into the tandem switch. Nonetheless, even though Halo could deny cost responsibility in these cases, Halo is paying AT&T for the multiplexing. In other words, these charges are not in dispute. Other than for this DS-3 to DS-1 muxing, AT&T is not providing any transport or multiplexing on Halo’s side of the POI. If and to the extent AT&T insists on moving forward with this part of the Complaint, Halo reserves the right to seek a refund for the payments it has made for DS3/DS1 multiplexing.

AT&T appears to be attempting to recover charges for DS1/DS0 multiplexing that AT&T performs to knock out 24 DS0s from each cross-connect and then connect to a port on AT&T’s tandem switch. This multiplexing is clearly on AT&T’s side of the POI. Further, it may well be not even necessary. Most Class 4 tandem switches today have DS3 trunk port interfaces and DS1 interfaces are almost universal. Halo cannot understand why AT&T believes it should, and Halo must pay for, demultiplexing down to the DS0 level to get to the termination on the tandem trunk port. Regardless, the fact is that the DS1/DS0 multiplexing is occurring on AT&T’s side of the POI.

IV.C of the ICA establishes the “POI” concept, which serves as the location where traffic exchange occurs and where a carrier’s financial responsibility for providing facilities ends and reciprocal compensation for completing the other carrier’s traffic begins. Under the ICA, both parties are responsible for bringing facilities to the POI at their own cost, and do not recover “facility” charges from the other for facility costs unless party A buys a “facility” from party B to get from party A’s network to the POI. Facility costs on the other side of the POI are not recoverable as such; instead, the providing party’s cost recovery occurs through reciprocal compensation.

AT&T is attempting to shift cost responsibility to Halo when the ICA assigns responsibility to AT&T. AT&T’s billings for the cross-connects and any DS1/DS0 multiplexing that Halo has disputed are incorrect and not supported by the ICA. Count IV of the Complaint, AT&T’s argument that Halo is in breach of the ICA because Halo has not paid AT&T for facilities, is without any foundation in the ICA and must be denied.

Russ Wiseman has provided pre-filed testimony on this issue and likely will provide live testimony on this issue at the hearing on the merits, as well.

- (5) A statement of issues to which the parties have stipulated;

Halo is not a party to any stipulation at this time.

- (6) A statement of all pending motions or other matters the party seeks action upon;

Halo intends to file motions to strike portions of the testimonies of AT&T witnesses, J. Scott McPhee, Mark Neinast, and Raymond W. Drause prior to the Prehearing Conference, as set forth in the Order Establishing Procedure, and subsequent to the filing of its motions to strike, Halo seeks action upon the same.

- (7) A statement identifying the party's pending requests or claims for confidentiality;

Halo has one pending request for confidentiality as to documents produced by AT&T Florida in response to the Staff's First Set of Interrogatories to AT&T Florida. Halo intends to file additional requests for confidentiality as to (1) documents produced by Halo in response to AT&T's First Set of Interrogatories and Request for Production of Documents to Halo and (2) documents produced by AT&T Florida in response to Halo's First Set of Interrogatories, Request for Admissions, and Request for Production to AT&T Florida.

- (8) Any objections to a witness' qualifications as an expert. Failure to identify such objection will result in restriction of a party's ability to conduct voir dire absent a showing of good cause at the time the witness is offered for cross-examination at hearing; and

Halo objects to the qualifications of AT&T witnesses, J. Scott McPhee, Mark Neinast, and Raymond W. Drause to the extent that they are being offered experts regarding the interpretation of statutes, rules and/or orders on grounds that the testimony offered by AT&T in this proceeding fails to provide any expertise for the witnesses in these areas and the witnesses otherwise do not appear to have any specialized knowledge, experience, training or education that would qualify them as experts in such areas.

As noted in section 6 above, Halo intends to file motions to strike portions of the testimonies of AT&T witnesses, J. Scott McPhee, Mark Neinast, and Raymond W. Drause prior to the Prehearing Conference, as set forth in the Order Establishing Procedure.

- (9) A statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

Halo believes that this prehearing statement complies with all the requirements of the Order Establishing Procedure.

Dated this 7th day of June, 2012.

Respectfully submitted,

/s/ Gary V. Perko

GARY V. PERKO

Florida Bar No. 855898

HOPPING GREEN & SAMS, P.A.

119 S. Monroe Street, Suite 300

Post Office Box 6526

Tallahassee, FL 32314

Phone: 850-425-2359

Fax: 850-224-8551

STEVEN H. THOMAS

Texas State Bar No. 19868890

TROY P. MAJOUE

Texas State Bar No. 24067738

JENNIFER M. LARSON

Texas State Bar No. 24071167

McGUIRE, CRADDOCK

& STROTHER, P.C.

2501 N. Harwood, Suite 1800

Dallas TX 75201

Phone: 214.954.6800

Fax: 214.954.6850

W. SCOTT MCCOLLOUGH

Texas State Bar No. 13434100

MATTHEW A. HENRY

Texas State Bar No. 24059121

MCCOLLOUGH|HENRY PC

1250 S. Capital of Texas Hwy., Bldg. 2-235

West Lake Hills, TX 78746

Phone: 512.888.1112

Fax: 512.692.2522

Attorneys for Halo Wireless, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Halo Wireless, Inc.'s Prehearing Statement has been served on the following by electronic mail on this the 7th day of June, 2012:

Tracy Hatch
Suzanne Montgomery
150 South Monroe Street, Suite 400,
Tallahassee, Florida, 32301-1546
thatch@att.com
SM6526@att.com
Counsel for BellSouth Telecommunications, LLC d/b/a AT&T Florida

Lawrence Harris
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
lharris@psc.state.fl.us

s/ Gary V. Perko
Gary V. Perko