

State of Florida



Public Service Commission

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COMMISSION
CLERK

DATE: March 1, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Harris)
Division of Regulatory Analysis (King)

Handwritten signature in black ink, appearing to be "M. King".

RE: Docket No. 110234-TP – 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.

AGENDA: 03/13/12 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested; Participation at Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110234.RCM.DOC

Case Background

On July 25, 2011, BellSouth Telecommunications, LLC d/b/a AT&T Florida (“AT&T”) filed a Complaint and Petition for Relief (“Complaint”) against Halo Wireless, Inc. (“Halo”). In the Complaint, AT&T alleges that Halo has violated the terms of the parties’ interconnection agreement (“ICA”) by terminating traffic to AT&T which was not originated on a wireless network, in order to avoid the payment of access charges to AT&T. AT&T asked that the Complaint be bifurcated into two phases: an expedited initial phase where the Commission would terminate the parties’ ICA, and then a second phase where the Commission would determine any amounts Halo owed AT&T. In support of its Complaint, AT&T specifically alleges the Commission has jurisdiction pursuant to Federal Law, the terms of the Parties’ ICA, and Chapters 120 and 364, Florida Statutes (“F.S.”).

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On August 8, 2011, Halo filed for Chapter 11 Bankruptcy Protection in the United States Bankruptcy Court for the Eastern District of Texas. On August 16, 2011, Halo filed a Suggestion of Bankruptcy, Notice of Stay, and Notice of Extensions with the Commission. The effect of Halo's Bankruptcy was an automatic stay of the Commission's proceedings until such time as the Bankruptcy Court should order otherwise.

On September 30, 2011, Halo filed a Notice of Removal with the District Court in Tallahassee, in which Halo sought to remove the pending (but stayed) Commission proceeding to the United States District Court for the Northern District of Florida ("District Court"). In the removal action, Halo asserted that the issues involved in the Commission proceeding implicated questions of Federal law over which the Federal Communications Commission, not the Florida Commission, had exclusive jurisdiction. Halo also asked the District Court to transfer the action from the Northern District of Florida to the Bankruptcy Court in Texas.

On December 9, 2011, the District Court issued its Order of Remand, whereby the District Court remanded this matter back to the Commission for further proceedings.¹ In its Order, the District Court noted that the Bankruptcy Court had specifically ruled "that the pending proceedings against Halo in state public utility commissions – but not any attempts to collect any amount determined to be due – are exempt from the automatic stay."

Following the District Court's Order, on December 16, 2011, the Prehearing Officer issued Order No. PSC-11-0506-PCO-TP, Order Resuming Docket, and giving Halo twenty (20) days in which to file an answer to the Complaint. On January 5, 2012, Halo filed a Partial Motion to Dismiss and Answer to AT&T's Complaint ("Motion to Dismiss"). In the Motion to Dismiss, Halo sought that Counts I, II, and III of AT&T's Complaint be dismissed, while answering Count IV of AT&T's Complaint. On January 17, 2012, AT&T filed a Response to Halo's Partial Motion to Dismiss ("AT&T Response"). On February 27, 2012, Halo filed a First Notice of Supplemental Authority, advising the Commission of recent activity of the United States Court of Appeals for the Fifth Circuit with regards to Halo's bankruptcy proceeding.

This recommendation addresses Halo's Partial Motion to Dismiss. Neither party requested oral argument; however, pursuant to Rule 25-22.0022, Florida Administrative Code (F.A.C.), the Commission has the discretion to hear from the parties, if it so desires. The Commission is vested with jurisdiction over these matters pursuant to the provisions of 47 United States Code §252 and Chapters 364 and 120, F.S.

¹ Order of Remand, BellSouth Telecommunications, LLC v. Halo Wireless, Inc., Case No. 4:11cv470-RH/WCS (N.D. Fla., December 9, 2011), filed as Commission Document No. 08930-11.

Discussion of Issues

Issue 1: Should the Commission grant Halo Wireless, Inc.'s Partial Motion to Dismiss?

Recommendation: No. The Commission should deny Halo's Partial Motion to Dismiss. AT&T's Complaint states a cause of action upon which the Commission can grant relief. (Harris, King)

Staff Analysis:

Legal Standard for Motion to Dismiss

A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action.² In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the petitioner, the petition still fails to state a cause of action for which relief may be granted.³ The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.⁴

When making this evaluation, only the petition and documents attached to or incorporated therein by reference can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.⁵ Where agreement terms are incorporated into the petition by reference and are the basis of the petition, the agreement can be reviewed in determining the "nature of the alleged claim."⁶

AT&T's Complaint

AT&T alleges that AT&T and Halo entered into an ICA, when Halo adopted the AT&T – T Mobile agreement in its entirety; this adoption was acknowledged as effective on July 27, 2010 in Docket No. 100194-TP. Pursuant to the ICA, claims AT&T, Halo is only authorized to terminate wireless originated traffic to AT&T, and may not terminate non-wireless (or wireline) originated traffic. AT&T avers that in order to avoid the payment of access charges, Halo altered the Charge Party Number ("CN") to disguise the nature of the traffic. As a result of this conduct, AT&T alleges Halo owes it significant amounts of money, amounts which are increasing every month Halo's conduct continues. As relief, AT&T seeks the termination of the parties' ICA; the discontinuation of interconnection, traffic transit, and termination services to Halo; and the payment of money owed AT&T.

AT&T's Complaint contains four (4) counts against Halo. Count I alleges Halo sends large amounts of wireline-originated toll traffic to AT&T for termination, in violation of the parties' ICA. Count II alleges that Halo alters the call information provided to AT&T, in order

² Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

³ *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

⁴ Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

⁵ Varnes v. Dawkins, 624 So. 2d at 350; Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), *overruled on other grounds*, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

⁶ See Veal v. Voyager Prop. & Cas. Ins. Co., 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011).

to disguise the source of the call, in violation of the ICA. Count III alleges that Halo's unauthorized wireline-originated traffic, being in violation of the terms of the ICA, should be billed at AT&T's tariffed switched access rate. Count IV of the Complaint alleges that Halo has ordered, but failed to pay for, certain transport facilities associated with interconnection.

AT&T specifically alleges the Commission has jurisdiction to interpret and enforce the ICA and AT&T's state tariffs. AT&T avers that §252 of the Act (Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56) expressly authorizes state commissions to mediate interconnection agreement negotiations, arbitrate interconnection agreements, and approve or reject interconnection agreements. AT&T further alleges that Section XX of the parties' ICA specifically provides that either party may petition the Commission for a resolution of a dispute arising from the ICA. Finally, AT&T maintains that Chapters 120 and 364, F.S., as well as Chapters 25-22 and 28-106, F.A.C., provide specific state law authority for the Commission to adjudicate this dispute.

Halo's Partial Motion to Dismiss

In its Partial Motion to Dismiss, Halo avers that it is a commercial mobile radio service ("CMRS") provider, authorized by the FCC to provide wireless service as a common carrier. Halo states that while AT&T has styled its Complaint as a dispute regarding the parties' ICA, AT&T does not in fact seek interpretation or enforcement of the ICA. Rather, Halo asserts that AT&T is actually seeking to have the Commission decide whether Halo is acting within the scope of its federal license, and the Commission lacks jurisdiction to make this determination.

Halo maintains that it sells wireless telephone exchange service to a high volume customer, Transcom Enhanced Services, Inc. ("Transcom"), and AT&T's Complaint is actually seeking to have the Commission decide whether Transcom is an Enhanced/Information Service Provider ("ESP"); again, Halo alleges the Commission is without jurisdiction to make this determination. Halo asserts it sells wireless based telephone exchange service to Transcom, and therefore, none of the traffic at issue is subject to access charges.

Halo asserts that only the FCC has jurisdiction to determine whether Halo's service is in fact wireless. Despite the fact the FCC has exclusive jurisdiction over CMRS providers, Halo alleges AT&T and other ILECs have "coordinated a multi-state attack" on Halo, with over 100 ILECs suing Halo in over 20 proceedings in 10 states, in all cases accusing Halo of "an access charge avoidance scheme," and accusing Halo of altering Called Party Number ("CPN") information which they know is not true. Halo maintains that it populates the charge number field with Transcom's number, because Transcom is the end user customer, and "applicable industry standards" call for this practice.

Halo goes on to allege that the underlying dispute in this docket is controlled by federal law, which preempts any state disposition of these issues. Halo claims both the FCC and the courts agree that states cannot regulate CMRS providers, and that state commissions cannot issue "cease and desist" orders to CMRS providers. Halo states that the regulatory classifications for Halo and Transcom are defined and governed exclusively by federal law, and states are preempted from regulating CMRS providers, over whom the FCC has exclusive jurisdiction.

As to Count I of AT&T's Complaint, Halo asserts that the traffic at issue is in fact wireless-originated. Halo's customers have wireless customer premises equipment ("CPE"), which transmits calls to Halo's base station; Halo's network processes these calls and hands them off to the LEC for termination or transit. Halo concludes that once Transcom's status as an ESP is acknowledged, Transcom is an end user, and AT&T's contentions fail, since AT&T's claim in Count I is based on the idea that Halo's customers are not end users.

Regarding Count II, Halo reaffirms that Transcom is an end user. Halo asserts that its practices regarding address signaling ensure that AT&T's system recognizes end user telephone exchange traffic, exactly as required by the ICA. Halo avers that its method is exactly the same as AT&T's with respect to a large business end user. Halo states that it does not change the content or in any way manipulate the address signal information that is ultimately provided to AT&T; AT&T's claim is based upon its incorrect assertion that Transcom is a carrier rather than an end user. Halo concludes that it is exactly following industry practice applicable to exchange carriers providing access to end users, "and in particular a communications-intensive business end user with sophisticated CPE."

As to Count III, Halo disputes AT&T's assertion that the traffic at issue is subject to exchange access charges. Halo reiterates AT&T's position that AT&T wishes to defer the Commission's consideration of Counts III and IV until after Counts I and II are resolved, and further, since AT&T admits that the traffic is not covered by the ICA, AT&T is in effect seeking a claim for damages, over which the Commission has no legal jurisdiction. Regardless, Halo claims, the Bankruptcy Court's Order does not allow the Commission to order payment of any sums. Halo continues, however, to maintain that it does not owe AT&T access charges as alleged in Count III for several reasons.

Finally, with respect to Count IV, Halo admits that the Commission has jurisdiction over the "facilities" issue, but denies that it ordered the specific "transport facilities" at issue, or that AT&T in fact provided those facilities. Halo essentially claims that the elements at issue are actually "trunks" or "trunk groups," which ride on, but are not themselves, "facilities."

AT&T's Response

In its Response, AT&T asserts that by mid-2010, AT&T Florida and other AT&T Incumbent Local Exchange Carriers ("ILECs") determined that Halo was terminating large amounts of traffic, which was not wireless-originated. Accordingly, states AT&T, several AT&T ILECs, as well as several other carriers (including TDS and many rural local exchange carriers) have filed complaints against Halo in other state commissions, based upon the same claims about Halo's business practices. In total, AT&T asserts there are more than 20 cases pending before state commissions.

AT&T asserts that Halo filed for bankruptcy the day before the first state commission (Georgia's PSC) was due to begin an evidentiary hearing, in an attempt to stay all state proceedings. When the Bankruptcy Court did not stay state proceedings, Halo sought review of the Bankruptcy Court's decision, which was denied. Simultaneously, claims AT&T, Halo was

attempting to remove state commission complaints to various federal courts, on the basis of exclusive federal jurisdiction. AT&T asserts that the Florida court rejected Halo's argument and remanded the proceeding back to the Commission, and every other court which has ruled on the removal petition has likewise remanded the case to the state commission. AT&T states that in two states which are moving forward, Halo filed Motions to Dismiss identical to the Partial Motion filed here; both State Commissions denied those motions. AT&T avers that the July 25, 2011 Complaint alleges straightforward breaches of the parties' ICA, and that the Commission has jurisdiction over these claims.

AT&T argues that both Florida and Federal law are clear that the Florida Public Service Commission is the appropriate forum to seek relief for allegations of breach of an ICA. AT&T avers that its Complaint does not ask the Commission to construe Halo's wireless licenses, and nothing in AT&T's Complaint even references those wireless licenses. AT&T maintains that all of its claims relate directly to breaches of the Commission-approved ICA, and the FCC, federal courts, and this Commission have all recognized the Commission's authority over ICA disputes.

Furthermore, AT&T claims that the dispute about whether the traffic terminated to AT&T is wireless-originated is a factual dispute, and for purposes of a motion to dismiss, all factual allegations in the complaint must be assumed to be true. AT&T goes on to aver that in its recent Connect American Fund decision, the FCC rejected Halo's specific argument regarding the nature of the traffic, and re-affirmed that the traffic is wireline-originated.

Finally, AT&T asserts that it does not seek any relief in this proceeding beyond that which the Bankruptcy Court specifically authorized. AT&T states that it merely asks the Commission to determine that Halo is responsible for payment of any unpaid access charges or facilities charges, and not to quantify the amount or require payment. Accordingly, AT&T requests that Halo's Partial Motion to Dismiss be denied.

Halo's First Notice of Supplemental Authority

By its First Notice of Supplemental Authority ("First Notice"), Halo advises the Commission that the United States Court of Appeals for the Fifth Circuit has decided to hear Halo's appeal of the Bankruptcy Court's denial of the stay and remand to state commissions. Halo advises that the Fifth Circuit has established an expedited briefing and oral argument schedule, setting the week of April 30, 2012, for oral arguments. Halo suggests that "if the Fifth Circuit finds, consistent with all extant precedent, that the state commission proceedings are subject to the automatic stay, any actions taken by the state commissions would be void *ab initio*." Halo concludes that the "risk of reversal" of the bankruptcy court's decision is real, and therefore, "Halo requests that this tribunal abate any deadlines or proceedings until the conclusion of the appellate process in the Fifth Circuit."

Staff Analysis

Despite the convoluted procedural nature of this docket, the issue before the Commission is whether to grant or deny Halo's Partial Motion to Dismiss Counts I – III of AT&T's Complaint. As stated above, the standard to apply is whether, accepting all of AT&T's

allegations as true and in a light most favorable to AT&T, AT&T has stated a cause of action upon which this Commission has jurisdiction to grant any relief. Staff recommends that the answer to that question is yes, and therefore, Halo's Partial Motion to Dismiss should be denied.

In Counts I and II,⁷ AT&T has alleged that Halo is terminating wireline traffic, unauthorized by the parties' ICA, and is not paying access charges for such traffic, which constitute breaches of the parties' ICA. Accepting these allegations as true, both federal and state law clearly authorize the Commission to consider and adjudicate these claims.

As referenced by AT&T in its Response, both federal law (specifically 47 U.S.C. §252) and state law (Section 364.16, F.S.) designate the Florida Commission as the primary authority to interpret and enforce Interconnection Agreements approved by the Commission. This authority has been asserted by the Commission in several recent orders,⁸ and has been upheld by numerous federal court decisions.⁹ Thus, the Commission's primary jurisdiction to enforce the terms of Interconnection Agreements is beyond question.

As cited by AT&T in its response, two other states which have addressed and decided this issue, Tennessee¹⁰ and Wisconsin,¹¹ came to this same decision without equivocation. In denying Halo's substantially similar Motions to Dismiss, both states determined their authority under federal and their individual state laws to proceed with the dockets.¹² Furthermore, the terms of the Florida Commission approved AT&T Florida - Halo ICA specifically provide that disputes relating to the interpretation or the implementation of the agreement can be resolved by the Commission.¹³

⁷ AT&T is not requesting the Commission take any action regarding Count III, at least until Counts I and II are resolved. AT&T suggests that the Commission may not have jurisdiction over its claim for interstate switched access charges, and that AT&T expects it will file a federal court action for collection of interstate access charges. AT&T concludes that it is possible that such federal court action may also encompass AT&T's claims for intrastate access charges in Count III. Therefore, with respect to Count III, staff recommends the Commission need not make any decision at this time.

⁸ *Se, e.g.*, Order No. PSC-10-0457-PCO-TP, issued July 16, 2010, in Docket No. 100021-TP, In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.; Order No. PSC-11-0451-FOF-TP, issued October 10, 2011, In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.; Order No. PSC-11-0420-PCO-TP, issued September 28, 2011, in Docket No. 090538-TP, In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et. al.

⁹ *See, e.g. Am. Dial Tone, Inc. v. BellSouth Telecomms., Inc.*, 2010 U.S. Dist. LEXIS 123162 (N.D. Fla. 2010); BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1277-79 (11th Cir. 2003); Covad Communications v. BellSouth Corp., 374 F.3rd 1044 (11th Cir. 2004).

¹⁰ Tennessee Regulatory Authority Docket No. 11-00119, In Re: BellSouth Telecommunications, LLC v. Halo Wireless, Inc.

¹¹ Public Service Commission of Wisconsin Docket 9594-TI-100, Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.

¹² *Order Denying Motion to Dismiss*, Tennessee Regulatory Authority Docket No. 11-00119 at 12; *Order Denying Motions to Dismiss in Part With Prejudice and in Part Without Prejudice*, Public Service Commission of Wisconsin Docket 9594-TI-100 at 2-3.

¹³ *See* ICA, Section XX Resolution of Disputes ("...[i]f the issue is not resolved within 30 days, either party may petition the Commission for a resolution of the dispute, or to the extent that the Commission does not have

Finally, the Commission's clear authority in this matter was explained by Judge Hinkle in the Order on Remand:

The Florida Legislature and Congress have given the Florida Public Service Commission a role in resolving inter-carrier disputes on issues of this kind due to the Commission's expertise. *See, e.g.*, Fla. Stat. §364.16; 47 U.S.C. §252. As I noted in *Vartec*:

“[T]he Florida Legislature has given the Florida Public Service Commission authority to resolve disputes between carriers, *see* Fla. Stat. §364.07 (2001) [now Fla. Stat. §364.16 (2011)], not in an effort to bypass, but instead precisely because of, its regulatory expertise. By creating a remedy for inter-carrier disputes before the Commission, the Legislature did not simply afford jurisdiction over such disputes in a different court; instead, it afforded a remedy in a different type of forum altogether. In such a proceeding, the competence brought to bear will not be that of a court, but of a regulator.

Order on Remand, Pages 8 – 10, citing *BellSouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1283-84 (N.D. Fla. 2002).

Staff believes Halo's First Notice of Supplemental Authority is essentially an additional motion for stay or abatement of these proceedings. Regardless, staff sees no reason why the Commission should wait to decide the instant Motion to Dismiss. If the Commission denies the motion, the next step would be an issue identification meeting with the parties, where procedural matters will be discussed, followed by the establishment of a procedural schedule by the Prehearing Officer. Staff recommends that given the issues in this docket, discovery and prefiled testimony due dates will likely extend beyond April 2012, and there will be sufficient time to adjust the procedural schedule, if necessary, to take account of any decision by the Fifth Circuit prior to the evidentiary hearing in this docket.

In conclusion, staff recommends that the Commission has clear jurisdiction to adjudicate this Interconnection Agreement dispute under both federal and state law, as well as the terms of the ICA itself, and there is no reason to delay determination of Halo's Partial Motion to Dismiss. Accordingly, staff recommends the Commission should deny Halo's Partial Motion to Dismiss, since AT&T's Complaint states a cause of action upon which the Commission can grant relief.

jurisdiction or declines to review the dispute, then the FCC. However, each party reserves the right to seek judicial or FCC review of any ruling made by the Commission concerning this Agreement.”); Section XXVI, Governing Law (“this Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state in which service is provided, without regard to its conflict of laws principles, and the Communication Act of 1934 as amended by the Act.”).

Docket No. 110234-TP
Date: March 1, 2012

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open and be set for an evidentiary hearing.
(Harris)

Staff Analysis: In Issue 1, staff recommends that Halo's Partial Motion to Dismiss be denied, since the Commission has jurisdiction to hear and adjudicate AT&T's Complaint. However, Halo asks only that Counts I, II, and III of AT&T's Complaint be dismissed. Therefore, regardless of the Commission's decision on Issue 1, this docket should remain open and be set for an evidentiary hearing.