State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: October 4, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Harris)
Office of Telecommunications (Curry, Fogleman)

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: 10/16/12 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: Graham, Balbis, Brown

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 Florida") filed a Complaint and Petition for Relief ("Complaint") against Halo Wireless, Inc. ("Halo"). AT&T Florida is a certificated ILEC in Florida. Halo is an FCC-licensed CMRS wireless provider with facilities in Florida. Transcom Enhanced Services, Inc. (Transcom) is an unregulated business entity providing communications services and is Halo's sole customer. [1]

[1] Halo stated that Transcom is a high volume customer who purchases telephone exchange services from Halo. (Halo Prehearing Statement at 3) In the direct testimony of Robert Johnson, Mr. Johnson further identifies Transcom as a business end-user customer that purchases wireless-based telephone exchange services from Halo. (TR 14)

In the Complaint, AT&T Florida alleges that Halo has violated the terms of the parties' interconnection agreement ("ICA") by terminating traffic to AT&T Florida which was not originated on a wireless network, in order to avoid the payment of access charges. On August 8, 2011, Halo filed for Chapter 11 Bankruptcy Protection in the United States Bankruptcy Court for the Eastern District of Texas. On September 14, 2011, Halo filed a Notice of Removal with the District Court in Tallahassee, in which Halo sought to remove the pending Commission proceeding to the United States District Court for the Northern District of Florida. 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. 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 [bankruptcy] automatic stay." Substantially similar complaints have been filed in at least 10 other states, with almost identical procedural schedules and pre-hearing matters. To date, at least 5 other states, Tennessee,[2] Wisconsin,[3] South Carolina,[4] Georgia,[5] and Missouri[6] have issued final orders, all finding in favor of AT&T.

Following the District Court's Order, on December 16, 2011, this Commission issued Order No. PSC-11-0506-PCO-TP, Order Resuming Docket. On January 5, 2012, Halo filed a Partial Motion to Dismiss and Answer to AT&T's Complaint. On March 20, 2012, the Commission issued Order No. PSC-12-0129-FOF-TP, denying Halo's partial motion to dismiss AT&T Florida's complaint as to Counts I and II and directing this matter to be set for evidentiary hearing. On April 13, 2012, Order PSC-12-0202-PCO-TP, the Order Establishing Procedure, was issued. A Prehearing Conference was held June 20, 2012, and a Prehearing Order,[7] setting forth 9 issues for the Commission's decision, was subsequently issued. An evidentiary hearing was held July 12, 2012.

Subsequent to the hearing, on July 19, 2012, the Bankruptcy Court converted the case from a Chapter 11 reorganization case to a Chapter 7 liquidation,[8] and a bankruptcy Trustee has been appointed for Halo. On July 25, 2012, the Trustee requested that AT&T disconnect Halo in all states in which AT&T was providing service, and the disconnection process was completed

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Halo also asserts that all of the call traffic that Halo delivers to AT&T for final termination is initially received from Transcom. (TR 322)

[2] Tennessee Regulatory Authority, *Order*, issued January 26, 2012, in Docket No. 11-00119, In Re: BellSouth Telecommunications, LLC v. Halo Wireless, Inc.

[3] Wisconsin Public Service Commission, *Final Decision*, issued July 27, 2012, in Docket 9594-TI-100, Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.

[4] South Carolina Public Service Commission, *Order Granting Relief against Halo Wireless*, issued July 17, 2012, in Docket No. 2011-304-C, Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless.

[5] Georgia Public Service Commission, *Order on Complaints*, issued July 17, 2012, in Docket No. 34219, In Re: Complaint of TDS Telecom, et. al v. Halo Wireless.

[6] Missouri Public Service Commission, *Report and Order*, issued August 1, 2012, in File No. TC-2012-0331, Halo Wireless, Inc. v. Craw-Kan Telephone Cooperative, et. al.

[7] Order No. PSC-12-0323-PHO-TP, issued June 22, 2012, PSC Document No. 04163-12.

[8] *Order Converting Chapter 11 Case to Case Under Chapter 7 of the Bankruptcy Code*, Document No. 822, Case No. 11-42464-11, United States Bankruptcy Court for the Eastern District of Texas, Sherman Division.

August 1, 2012.[9] Accordingly, AT&T is no longer receiving traffic from Halo. In addition, on August 13, 2012, Halo's local counsel submitted a letter, advising that local counsel's firm "is not authorized to take any action on Halo's behalf. Accordingly, our firm will not be filing a Post-Hearing Brief in this matter."[10] No Post Hearing Brief has been filed for Halo. Pursuant to the Order Establishing Procedure, AT&T Florida filed a Post Hearing Brief (Brief or BR) on August 23, 2012.

Despite the discontinuance of service and bankruptcy liquidation of Halo, staff believes the Commission should make a decision and issue a final order in this docket. In order to perfect its claim for the amounts due in the bankruptcy court, AT&T Florida asserts that it still needs a ruling by this Commission that Halo is liable to AT&T Florida for access charges. (BR 1-2) Staff recommends that Halo has had ample opportunity to present its case through its pre-filed testimony, participation in the evidentiary hearing, and the opportunity to submit a post-hearing brief. Accordingly, Staff believes it is appropriate for the Commission to render a decision and issue a comprehensive opinion in this case.

[9] AT&T Florida's Post-Hearing Brief, PSC Document No. 05540-12.
[10] PSC Document No. 05527-12.

Discussion of Issues

Issue 1: Does the Commission have jurisdiction to address AT&T Florida's Complaint?

Recommendation: Yes. Both federal and state law, as well as the parties' interconnection agreement, clearly establish the Commission's jurisdiction to consider and adjudicate AT&T Florida's Complaint. (Harris)

Position of the Parties

AT&T FLORIDA: Yes. The Commission has jurisdiction to address disputes arising under the provisions of ICAs, including AT&T Florida's claims for breach of the ICA.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.[11]

Staff Analysis:

AT&T Florida's Argument

In its brief, AT&T Florida argues that the Commission has already determined this issue in the March 20, 2012 Order Denying Halo's Partial Motion to Dismiss[12] (BR 7). AT&T Florida maintains that the Commission's ruling, "like the ten other state commissions that have unanimously rejected Halo's jurisdictional claims, is plainly correct." (BR 7-8) AT&T Florida goes on to maintain that Halo's claims regarding the wireless nature of the traffic at issue are meritless, as addressed in Issue 2. (BR 8) AT&T Florida finally states that AT&T Florida, contrary to Halo's assertions, is not seeking that the Commission address Halo's FCC wireless licenses. *Id.*

Halo's Argument

In its Prehearing Statement, Halo states that the underlying dispute in this matter is controlled by federal law, which preempts any state disposition of these issues. (Prehearing Statement at 4) Halo asserts that only the Federal Communications Commission may make decisions which affect federal telecom licenses, like Halo's. *Id.* Halo further avers that courts have also held that state commissions cannot regulate wireless providers, including the federally granted right of wireless providers to interconnect. *Id.*

Halo asserts that Halo's and Transcom's regulatory classifications are defined and governed exclusively by federal law. *Id.* For example, Halo asserts that Transcom is an Enhanced Service Provider ("ESP") and therefore is not subject to access charges, but is instead an end user entitled to obtain telephone exchange service. *Id.* Halo goes on to maintain that

[11] Halo Wireless, Inc.'s Prehearing Statement, filed June 7, 2012, Commission Document No. 03737-12, as supplemented subsequent to the Prehearing Conference, held June 20, 2012.
[12] Order No. PSC-12-0129-FOF-TP, issued March 20, 2012.

states are prohibited from taking any action that would prohibit the provision of wireless services, over which the FCC has exclusive jurisdiction. *Id.*

Halo avers that federal courts have consistently held that state commissions cannot interpret or enforce federal licenses, that the FCC is the exclusive decider, and the FCC is therefore the only proper forum for determination of a wireless entity's practices. *Id.* Finally, Halo maintains that a state commission cannot take any action that would "amount to a suspension or revocation of a federal license." *Id.*

Staff Analysis

In Issue 1, Halo's arguments (as developed in the record) are substantially the same as it advanced in its January Motion to Dismiss, which the Commission denied, instead determining that this Commission does have jurisdiction to proceed under both state and federal law. And, after the conclusion of the evidentiary hearing and review of all record evidence, staff recommends the Commission's decision should be the same: the Commission clearly has jurisdiction to adjudicate this dispute, pursuant to both state and federal law, as well as by the terms of the parties' ICA.

Staff believes Halo's argument in this Issue can be reduced to one simple premise: because Halo possesses a federal wireless license, this Commission is prohibited to take any action that would have the effect of impairing that license. Staff does not accept this argument. Halo entered into an ICA with AT&T in Florida. (TR 75, 291; EX 11) This ICA was approved by this Commission, which by both federal law and the terms of the ICA itself, confer jurisdiction to interpret and enforce the terms of the ICA. If Halo believed only the FCC could take action affecting Halo, staff believes Halo should have sought to have the ICA approved by the FCC. Halo's choice to submit this ICA to this Commission for approval expressly confers jurisdiction on this Commission to enforce and interpret disputes arising solely from the ICA.

As determined by the Commission in the Motion to Dismiss, both federal law (specifically 47 U.S.C. §252) and state law (Section 364.16, F.S.) designate the Florida Public Service Commission as the primary authority to interpret and enforce Interconnection Agreements approved by the Commission. (BR 5, 7-8) The Commission has asserted this authority in several recent orders,[13] and this authority has been upheld by numerous federal court decisions.[14] Thus, staff recommends that the Commission's primary jurisdiction to enforce the terms of Interconnection Agreements is beyond question.

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[13] *See, 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 Docket No. 110087-TP, 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.

[14] *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).

As cited by AT&T Florida in its brief, ten other states have addressed and decided this issue, finding they had jurisdiction to proceed. (BR 8) In denying Halo's substantially similar Motions to Dismiss, every state determined their authority under Federal and their individual state laws to proceed with the dockets. *Id.* Furthermore, the terms of the AT&T Florida - Halo ICA specifically provide that disputes relating to the interpretation or the implementation of the agreement can be resolved by this Commission.[15]

Finally, our clear authority in this matter was explained by U.S. District 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).

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.

[15] *See* Exhibit 11, the 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 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.").

Issue 2: Has Halo delivered traffic to AT&T Florida that was not "originated through wireless transmitting and receiving facilities" as provided by the parties' ICA?

Recommendation: Yes. Halo has delivered traffic to AT&T Florida that was not "originated through wireless transmitting and receiving facilities" as provided by the parties' ICA. (Curry, Harris)

Position of the Parties

AT&T FLORIDA: Yes. The ICA only allowed Halo to send AT&T Florida traffic that originated on wireless equipment or facilities. Halo breached that provision, because a significant portion of the traffic that Halo sent to AT&T Florida originated on landline networks.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

In its brief, AT&T Florida contends that Halo breached the ICA by delivering traffic that was not originated through wireless transmitting and receiving facilities as stipulated by the parties' interconnection agreement. AT&T Florida argues that according to the ICA, Halo was only allowed to send traffic that originated wirelessly to AT&T Florida for termination or transit to another network. However, AT&T Florida maintains that despite this provision, a significant portion of the traffic that Halo sent to AT&T Florida originated on landline networks and was possibly subject to access charges. (BR 8)

AT&T Florida states that it rejects Halo's theory that Transcom is an ESP and should therefore be treated as an end-user. AT&T Florida also rejects Halo's theory that because Transcom is an end-user, all calls that Halo sent to AT&T Florida, regardless of how the calls were originated (wireless or non-wireless), should be deemed to have originated with Transcom. (BR 11) AT&T Florida argues that Halo's "Transcom Origination" theory fails because: (1) the FCC and five other commissions have rejected Halo's theory;[16] (2) there is no authority for the proposition that ESPs originate every call they touch; (3) Transcom is not an ESP; and (4) even if Transcom did originate calls, the calls were not wirelessly originated. (BR 12-13)

Halo's Argument

In its Prehearing Statement Halo states that the traffic at issue did originate through wireless transmitting and receiving facilities before Halo delivered it to AT&T Florida.

[16] The FCC rejected Halo's theory in its *Connect America Order* in paragraphs 1003-06. *Report and Order and Further Notice of Proposed Rulemaking, Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support*, WC Docket Nos. 10-90,07-135,05-337,03-109; GN Docket No. 09-51; CC Docket Nos. 01-92, 9645; WT Docket No. 10-208; FCC 11-161, 7 719, (released November 18, 2011)*("Connect America Order")*. The Tennessee, South Carolina, Georgia, Wisconsin, and Missouri Commissions also reached similar decisions. (BR 15)

(Prehearing Statement at 5) According to Halo, when a caller places a call, the call is initially routed through Transcom. As argued by Halo, when Transcom receives the call, it "terminates" the call then wirelessly "originates" or re-originates the call before sending it to Halo, who in turn passes the call to AT&T Florida for final termination. *Id.*

Halo contends that Transcom is not a telecommunications carrier, but is instead an ESP and end-user. According to Halo, under the FCC's view end-users originate calls. Halo further contends that Transcom's status as an end-user and ESP has been upheld by several courts and the rulings were incorporated into the Confirmation Order in Transcom's bankruptcy case.[17] Halo maintains that the courts also ruled that Transcom is an ESP for phone-to-phone calls because Transcom offers enhanced capabilities and alters the content of every call that passes through its system. (Prehearing Statement at 6) Halo contends that since Transcom is an ESP end-user, all calls that Halo receives from Transcom and routes to AT&T Florida for termination are intraMTA and are therefore not subject to access charges. [18] (Prehearing Statement at 3)

Staff Analysis

The ICA adopted by the parties includes a clause that stipulates that Halo is only allowed to send traffic to AT&T Florida for termination or for transit to another network that is wirelessly originated. (EX 11, EX 12) The ICA states:

> ***Whereas, the Parties have agreed that this Agreement will apply only to*** **(1)** traffic that originates on AT&T's network or **is** transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T*** for termination by AT&T or for transit to another network. (Emphasis added). [19]

AT&T Florida witness Neinast testified that after Halo began sending traffic to AT&T Florida, AT&T noticed that Halo's traffic exhibited several unusual patterns that were not typically characteristic of a start-up rural wireless service provider like Halo. (TR 139-140) After observing these patterns AT&T Florida became suspicious of Halo's actions and began analyzing Halo's traffic. *Id.* AT&T Florida analyzed traffic that Halo sent to AT&T during two one-week periods starting June 14, 2011 and September 26, 2011. AT&T Florida also analyzed Halo's traffic during a four week period beginning January 19, 2012. (TR 141-142) AT&T

[17] AT&T argues that the bankruptcy court's decision that Halo is an ESP under federal law (EX 27) is irrelevant because that decision was vacated on appeal and therefore carries no precedential or preclusive effect. (BR 18-19)

[18] AT&T Florida witness Neinast maintained that wireless traffic is classified as local (intraMTA) or non-local (interMTA) based on Major Trading Areas (MTA). If traffic is determined to be local it is subject to reciprocal compensation charges, whereas non-local traffic is subject to access charges which are typically much higher than reciprocal compensations rates. (TR 77-78)

[19] Both parties agree that the ICA in dispute in this docket is a wireless-only ICA. (TR 75-76, 291-292) AT&T Florida witness Neinast testified that, particularly for the treatment of local traffic, wireless and landline ICAs are different. (TR 77-79)

conducted its analysis by identifying the Calling Party Number (CPN) on each call received from Halo.[20] Once the CPN was determined AT&T consulted the industry's Local Exchange Routing Guide (LERG) and the Local Number Portability (LNP) database to determine what kind of carrier (landline or wireless) owned that number and whether the carrier that owned the number had designated it in the LERG as landline or wireless.[21] (TR 143-144) Witness Neinast further testified that despite the fact that virtually 100% of Halo's traffic was represented as local wireless, AT&T Florida's call analyses revealed that 45%-67% of the total traffic that Halo sent to AT&T Florida was landline-originated and possibly subject to access charges. (TR 144-145)

While Halo's witness Wiseman did not dispute that it sent traffic to AT&T Florida that may have originated on landline networks, he argued that because Transcom wirelessly "initiates a further communication" on all calls before Halo sends them to AT&T Florida, Halo has complied with the "wireless only" stipulations of the ICA. (TR 316, 320-322) Witness Wiseman also argued that because of IP and other technology developments, CPN is unreliable as a method to determine the location of the originating point of a call. He pointed to three paragraphs in the FCC's *Connect America Order* where the FCC stated that numbers are not reliable for this purpose. (TR 311-312)

Despite Halo's claims that Transcom wirelessly originates calls, AT&T witness Neinast argued that the FCC specifically rejected Halo's theory in the *Connect America Order.* In paragraph 1006, the FCC clearly indicated that a wireline-originated call cannot be wirelessly re-originated in the middle of a call path:

> 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. [footnotes omitted] (TR 80)

Staff believes AT&T's arguments are persuasive. The FCC specifically addressed both Halo and call origination in its *Connect America Order* and concluded that the arrangement used

[20] 47 C.F.R. § 64.1600(e) provides in part: "The term 'Calling Party Number' refers to the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signaling System 7 network." Witness Neinast equated it to "the telephone number of the originating caller." (TR 143)

[21] AT&T Florida witness Neinast defined the LERG as "a national routing database that stores information necessary to properly route traffic throughout the United States. It displays, for each NPA-NXX, the carrier to which that NPA-NXX is assigned, the tandem switch for routing interexchange and local traffic, and other pertinent information." (TR 143)

by Transcom and Halo does not convert an otherwise landline call into a wireless one. While the FCC did express concern over the use of numbers to determine the geographic end points of a call, it only restrained itself from mandating their use. The FCC still allowed their use in tariffs to govern the process of disputing charges.[22] Halo did not offer an alternative method for determining call origination. AT&T adjusted its analysis, accommodating Halo's arguments, and still submitted that over 40% of Halo's traffic during the study period was landline-originated. (TR 146-148, EXH 22) Staff believes that, absent a better method, CPN is still the best available method to determine a call's origination.

Halo also argued that the FCC views Transcom as an end-user and an ESP and is thus exempt from carrier access charges. Halo witness Wiseman relied on four separate past rulings by bankruptcy courts in previous cases that Transcom was an ESP. (TR 329-331) Halo witness Johnson testified that, as an ESP, Transcom changes the content of every call that passes through its system by initiating an "enhanced service session" which includes activating such services as "Voice Activity Detection" and "Comfort Noise Generation." (TR 26-28)

AT&T Florida witness Neinast countered that the "enhanced services" that Transcom provides, minimizing background noises on voice calls and inserting "comfort noises" during periods of silence, does not fall within the FCC's definition of enhanced services.[23] (TR 154-155) AT&T Florida further argues in its Brief that the FCC has upheld that a service is not "enhanced" when it is merely "incidental" to the underlying telephone service or merely "facilitate[s] the establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that in deciding whether a service is "enhanced" one must use the end user perspective. Since Transcom does not alter or add content to a call by suppressing background noise and adding comfort noise, it is not providing an enhanced service and is therefore not an ESP. (BR 20)

Again, staff agrees with AT&T's arguments. Staff is not convinced that the services provided by Transcom as presented in this record meet the FCC's definition of enhanced services. As AT&T witness Neinast stated, it appears that Transcom merely provides routine call quality processing. (TR 154-155) Additionally, if Halo has been terminating wireline-originated calls and the calls are not re-originated by Transcom, as staff believes has happened, then whether or not Transcom is an ESP becomes irrelevant. If Transcom is not wirelessly-originating the calls, it does not matter whether or not it is an ESP.

In conclusion, the parties' ICA only permits Halo to send wireless traffic to AT&T Florida for termination. Halo has acknowledged that it may have sent non-wireless originated traffic to AT&T Florida. The FCC has specifically addressed Halo's claims that Transcom wirelessly re-originates wireline calls and has rejected it. In addition, staff believes that the "enhanced services" that Transcom provides do not comply with the FCC's enhanced services

[22] *Connect America Order* at paragraphs 934, 960, and 962

[23] 47 C.F.R. § 64.702(a) provides in part: "For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."

definition and that because it is not originating calls its status as an ESP is not relevant. Therefore, based on staff's review of the parties' ICA, the FCC's rulings, and staff's analysis of the parties' arguments, staff concludes that Halo has delivered traffic to AT&T Florida that was not "originated through wireless transmitting and receiving facilities" as provided by the parties' ICA.

Issue 3: Has Halo complied with the signaling requirements in the parties' ICA?

Recommendation: No. Halo has not complied with the signaling requirements in the parties' ICA. (Curry, Harris)

Position of the Parties

AT&T FLORIDA: No. Until late 2011, Halo inserted a Transcom Charge Number on every call. Charge Numbers denote the financially responsible party for calls, when different from the calling party. But, Transcom is not the financially responsible party and Halo's improper Charge Number misled AT&T Florida about the nature of the calls.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

AT&T Florida argues that Halo failed to provide accurate call detail information as required by the parties' ICA. AT&T Florida contends that this provision within the ICA is important between interconnected carriers because call detail information is used to determine the appropriate intercarrier compensation that is due. Providing inaccurate call detail information makes it very difficult for billing systems to accurately analyze and bill calls. (BR 27)

AT&T Florida contends that up until December 2011, Halo inaccurately inserted Transcom's charge number (CN) on every call.[24] Moreover, claims AT&T Florida, in every case where Transcom's CN was inserted the charge number was in the same MTA as the MTA where the call was being terminated to.[25] *Id.* As a result, every call that Halo routed to AT&T Florida appeared to be both wireless and local. Since Halo represented all of the calls as local, it appeared that the calls were subject to reciprocal compensation rather than access charges.[26] *Id.*

AT&T Florida argues that there is no justification for Halo's insertion of Transcom's charge number. (BR 28) AT&T Florida states that because there is no relationship between Transcom and any of the calling parties, Transcom is not financially responsible for the calls. *Id.* AT&T Florida also argues that Transcom is not financially responsible for the calls because Transcom does not originate any calls. If Transcom had actually originated the calls, as Halo

[24] 47 C.F.R. 64.1600(g) provides in part: "(t)he term 'charge number' refers to the delivery of the calling party's billing number in a Signaling System 7 environment by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users."
[25] Wireless traffic is classified as local (intraMTA) or non-local (interMTA) based on Major Trading Areas (MTA) and landline traffic is classified as local (intraLATA) or non-local (interLATA) based on Local Access and Transport Areas (LATA) or local calling areas. (TR 77-78)
[26] If traffic is determined to be local it is subject to reciprocal compensation charges whereas non-local traffic is subject to access charges which are typically much higher than reciprocal compensations rates. (TR 77-78)

claims, Transcom's number would have shown up in the calling party number field on the call detail information. *Id.*

AT&T Florida further takes issue with Halo's claims that inserting Transcom's CN caused no harm and did not prevent AT&T Florida from accurately billing Halo for termination. (BR 28-29) AT&T Florida maintains that because the ICA indicates that AT&T Florida will bill Halo for termination of wireless calls based on a factor for the percentage of calls to be treated as interMTA, rather than billing on a call-by-call basis, Halo's assertion that its activities caused no harm is incorrect. *Id.*

Halo's Argument

In its Prehearing Statement Halo states that prior to December 29, 2011, it inserted Transcom's billing telephone number (BTN) into the CN on the call detail information. (Prehearing Statement at 7) Halo contends that the purpose of inserting Transcom's BTN as the CN was to designate the party who was financially responsible for the calls. Halo further argues that because Transcom is an end-user and an ESP, that the call detail information that it provided accurately portrayed the traffic as intraMTA, and therefore subject to the "local" charges in the parties' ICA. *Id.* In addition, Halo argues that inserting a charge number did not prevent AT&T Florida from properly billing Halo because, according to the ICA, Halo is billed based on the traffic factors that were negotiated between the parties and not on a call-by-call basis. *Id.*

Staff Analysis

Section XIV.G. of the parties' ICA states that:

> The parties will provide each other with proper call information, including all proper translations for routing between networks and any information necessary for billing where BellSouth provides recording capabilities. This exchange of information is required to enable each party to bill properly.
> (Ex 11, Page 26)

AT&T Florida witness Neinast explained that the call detail information includes the phone number of the person that originated the call, also known as the Calling Party Number (CPN) and, when applicable, the charge number. The CN is used to identify the entity that is financially responsible for the call when the responsible party is different than the CPN. (TR 159) The call detail information usually only lists the CPN, which is used to determine how the call is categorized (local or non-local) and billed. The CN field is usually blank or the same as the CPN. *Id.* However, when the call detail information includes both a CPN and CN and the CN is different than the CPN, the CN overrides the CPN and controls how the call is categorized and billed. (TR 160)

It is undisputed that that Halo inserted Transcom's billing telephone number as the charge number on every call that it sent to AT&T Florida for termination. However, a charge

number should only be used to identify the financially responsible party when the originating party is not responsible. Since there is no relationship between Transcom and any of the calling parties and Transcom did not originate any of the calls, staff does not believe Transcom is financially responsible. If Transcom had actually originated the calls, as Halo claims, Transcom's number would have shown up in the CPN field on the call detail information.

In the *Connect America Order* the FCC addressed the problem of charge number substitution that disguises the characteristics of traffic to terminating carriers, and found that CN substitution is a technique that leads to phantom traffic. (TR 194) In paragraph 714 of the *Connect America Order*, the FCC stated that the CN field "may not contain or be populated with a number associated with an intermediate switch, platform, or gateway," yet that is what Halo did. (TR 194) Therefore, staff believes Halo's insertion of Transcom's CN on the call detail information is not justified.

Staff also does not agree with Halo's assertions that its insertion of Transcom's CN caused AT&T Florida no harm and did not prevent AT&T Florida from accurately billing Halo for termination. Halo makes this argument on the theory that because the ICA indicates that AT&T Florida will bill Halo for termination of wireless calls based on a factor for the percentage of calls to be treated as interMTA, rather than billing on a call-by-call basis, the call number substitutions are irrelevant. (TR 337-339; EX 24) Staff believes Halo's theory fails, because the ICA allows the factor to be adjusted based on the actual traffic sent by Halo. By inserting Transcom's CN into the call detail information, Halo caused the billing records to inaccurately indicate that all of Halo's traffic was intraMTA when in fact a large portion of Halo's traffic was actually interMTA. (TR 193-194) Had AT&T Florida not become suspicious of Halo's call detail information and investigated the matter, AT&T Florida would not have known that the billing factors needed to be adjusted to account for the interMTA traffic. Therefore, Halo's insertion of Transcom's CN not only caused harm by disguising the true nature of the call traffic, thus enabling Halo to avoid paying access charges for non-local traffic, it also prevented AT&T Florida from accurately billing Halo for its terminating traffic. *Id.*

Staff believes that by inserting Transcom's billing telephone number as the charge number on the call detail information when Transcom was not financially responsible for the calls, Halo provided inaccurate call detail information to AT&T Florida. Halo also provided inaccurate call detail information when it inserted a local charge number for each call despite the fact some of the calls were non-local. Therefore, based on the terms of the parties ICA and on staff's analysis, staff recommends that Halo did not comply with the signaling requirements in the parties' ICA.

Issue 4: Has Halo paid the appropriate compensation to AT&T Florida as prescribed by the parties' ICA? If not, what compensation, if any, would apply?

Recommendation: No. Halo has not paid the appropriate compensation to AT&T Florida as prescribed by the parties' ICA. Halo is responsible to pay the access charges for all non-local traffic it has sent to AT&T Florida. However, if the Commission denies staff's recommendation on Issue 2, then Halo has paid the appropriate form of compensation (i.e., reciprocal compensation). (Fogleman, Harris)

Position of the Parties

AT&T FLORIDA: No. The landline-originated traffic that Halo sends to AT&T Florida is not authorized by the ICA. Much of it is non-local, subject to terminating access charges under AT&T Florida's tariffs. Because it has used terminating switched network access service, Halo is responsible to pay those tariffed access charges.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

AT&T Florida contends that Halo sent it landline interexchange traffic (both interstate and intrastate) that Halo misrepresented as local. (BR 30) As a result, claims AT&T Florida, Halo only paid AT&T Florida reciprocal compensation charges instead of higher access charges that apply to non-local traffic. *Id.* AT&T Florida maintains that because the landline-originated traffic was not permitted by the wireless-only ICA, there are no terms in the ICA defining the proper intercarrier compensation that Halo must pay AT&T Florida for terminating that traffic. (BR 31)

AT&T Florida asserts that the appropriate rates that Halo should pay can be found in its federal tariff filed with the FCC for interstate traffic. (BR 30) AT&T Florida states that its tariff requires Halo to pay access charges on the interstate traffic AT&T Florida terminated for Halo. *Id.* For intrastate traffic, AT&T Florida argues that its state tariff, filed with FPSC, requires Halo to pay access charges on the intrastate non-local traffic AT&T Florida terminated for Halo. *Id.*

AT&T Florida also asserts that, even absent an ICA for wireline traffic, the "constructive ordering" doctrine applies and Halo is still liable to AT&T Florida for access charges. (BR 31-33) AT&T Florida further argues that the FCC and five state commissions have held that Halo is either not exempt from, or is affirmatively liable for, terminating access charges. (BR 33)

Halo's Argument

Halo believes that the ICA it adopted with AT&T Florida only requires it to pay reciprocal compensation because its customer's traffic is wireless IntraMTA traffic. It argues that the ICA supports this conclusion because Halo's customer, Transcom, is an ESP and that

ESPs are "end users." As a result of its customer's "end user" status, asserts Halo, traffic from Transcom sent to Halo over a wireless network is "wireless originated," consistent with the AT&T Florida ICA terms. (Prehearing Statement at 5-6)

Furthermore, Halo notes that the FCC characterized Halo's traffic as "transit." Halo argues the FCC states that "transiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier's network." Thus, asserts Halo, even if the FPSC accepts the proposition that Transcom is a carrier, then access charges are still not owed to AT&T Florida. (Prehearing Statement at 5)

Staff Analysis

The premise of the ICA that Halo and AT&T Florida entered into was that all of the traffic would be wireless in nature. (TR 75-76, EX 11) Halo contends that this traffic is local and subject to reciprocal compensation charges as opposed to the higher access charges that apply to non-local traffic. (TR 288)

AT&T Florida contends that Halo sent landline interexchange traffic for which access charges are due under federal and state tariffs. (TR 84-85) AT&T Florida argues that Halo "constructively orders" services under a tariff, and must pay the tariffed rate, if it (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of services; and (3) does in fact receive such services.[27] (BR 31)

Halo also argues that the FCC concluded in the *Connect America Order* that Halo's service is merely a transit service and it cannot owe terminating access charges to AT&T Florida or other carriers. (TR 351) Staff disagrees. Staff agrees with AT&T Florida that the *Connect America Order* never held that Halo's service is a transit service. The *Connect America Order* did however address the issue as to whether Transcom could be deemed to originate every call it touches and whether the calls Halo was handing to AT&T Florida should be treated as local or non-local. (TR 79-80) The FCC found that "a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules." (TR 80) The FCC used the term "transit" merely to point out that entities that simply pass calls on in the middle of the call path are not viewed as originating those calls. *Id.*

As addressed in Issue 2, staff does not agree with Halo's categorization of its traffic and that significant amounts of its traffic were landline-originated. Staff therefore believes that access charges are due to AT&T Florida. Section VII.B. of the parties' wireless ICA contemplates interMTA non-local traffic and refers to AT&T's intrastate and interstate access tariffs for applicable rates. (EXH 11, page 21) Compensation for non-wireless forms of traffic is not addressed within the ICA between Halo and AT&T Florida. (TR 76; EX 11) The lack of terms in the ICA defining the proper intercarrier compensation that Halo must pay for

[27] *Advamtel LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va 2000) (citing *United Artists Payphone Corp. v. New York Tel. Co.*, 8 FCC record 5563 at ¶ 13(1993) and *In re Access Charge Reform*, 14 FCC record 14221 at ¶ 188 (1999).

terminating landline–originated traffic does not excuse Halo from compliance with lawful tariffs.

In conclusion, because Transcom did not originate the calls Halo was passing on to other carriers for termination, those calls were not local (i.e., intraMTA) and therefore were not subject to the lower reciprocal compensation charges. The appropriate rates for compensation for any wireline-originated non-local traffic are interstate access charges filed with the FCC for interstate traffic and intrastate access charges filed with this Commission for intrastate traffic. The amount Halo owes AT&T Florida will be addressed by the bankruptcy court. Alternatively, if the Commission disagrees with staff's recommendation in Issue 2, then the reciprocal compensation rate paid by Halo is correct.

Issue 5: 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?

Recommendation: Yes. Halo has 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. (Fogleman, Harris)

Position of the Parties

AT&T FLORIDA: Yes. Under the ICA, costs for interconnection facilities are shared based on each carrier's respective use of the facilities. 100% (or nearly 100%) of the traffic over interconnection facilities was terminating traffic sent by Halo. Accordingly, Halo owes AT&T Florida for 100% of the costs. Halo has refused to pay.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

According to AT&T Florida, the ICA it entered with Halo is different from landline ICAs. (BR 34) One difference concerns cost responsibility for interconnection facilities. In a landline ICA, argues AT&T Florida, cost responsibility is typically determined by the point of interconnection ("POI"), in that the competitive carrier typically is responsible for the facilities on its side of the POI and the incumbent carrier is typically responsible for the facilities on its side of the POI. *Id.* AT&T Florida asserts that wireless ICAs are different. In a wireless ICA, claims AT&T Florida, cost responsibility for interconnection facilities is typically shared between the carriers and typically apportioned based on the amount of traffic sent by each carrier. (BR 35) AT&T Florida avers the Halo-AT&T Florida ICA is a typical wireless ICA in this regard. AT&T Florida states that Section V.B. of the ICA requires AT&T Florida and Halo to pay each other for interconnection facilities based on the proportion of the total traffic that each party sends to the other. *Id.* This apportioning of facilities cost, argues AT&T Florida, applies to the entire facility between AT&T Florida's switch and Halo's switch. *Id.*

AT&T Florida also argues that Halo's main defense is its theory that cost responsibility for interconnection facilities ends at the POI. *Id.* AT&T Florida avers that might make sense if Halo had a landline ICA, but it does not. Here, states AT&T Florida, the ICA uses the typical wireless ICA terms, where cost responsibility for interconnection facilities is based on proportional usage. *Id.* AT&T Florida claims that it is undisputed that 100% (or very close to 100%) of the traffic between the parties came from Halo, meaning Halo is responsible for 100% of the costs for the interconnection facilities that it ordered from AT&T Florida, obtained from AT&T Florida, and used to send traffic to AT&T Florida. *Id.* AT&T Florida further claims that Halo contends that trunking costs are to be shared proportionately under the ICA only when Halo uses AT&T Florida's facilities to get to the POI. *Id.* AT&T Florida argues that this is incorrect. As Section V.B. of the ICA states, the apportioning of the trunking cost applies "if the Parties mutually agree upon a two-way trunking arrangement." *Id.*

AT&T Florida states that it disagrees with Halo's assertion that facilities costs are covered by reciprocal compensation charges. (BR 36) Reciprocal compensation charges are per minute charges for the incremental cost incurred to transport and terminate traffic, asserts AT&T Florida. Facilities charges, in contrast, are non-usage sensitive recurring charges for the cost of the facilities themselves. *Id.* AT&T Florida argues that, to the best of its knowledge, no one has ever expressed the view that reciprocal compensation charges cover the cost of physical facilities. Finally, AT&T Florida avers that Halo admits that it ordered the facilities and trunk group elements for which AT&T Florida seeks payment. *Id.* AT&T Florida claims there is also no dispute that it provided the facilities and trunk groups that Halo ordered. *Id.*

Halo's Argument

Halo argues that under the ICA, AT&T Florida may only charge for interconnection "facilities" when AT&T Florida's "facilities" are used by Halo to reach the mutually-agreed POI. (Prehearing Statement at 7) Halo states that it obtains transmission from its network to AT&T Florida tandem buildings from third party service providers. In the vast majority of locations, asserts Halo, 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 Florida. In all Florida markets, except Miami, Halo asserts that it has secured third party transport all the way up to the mutually-agreed POI. Halo maintains the third party transport provider will have a collocation arrangement in the AT&T Florida tandem. *Id.*

Halo notes that Section IV.C. of the ICA establishes the "POI" concept, which serves as the location where traffic exchange occurs. (Prehearing Statement at 8) Halo asserts that this is where a carrier's financial responsibility for providing facilities ends and reciprocal compensation for completing the other carrier's traffic begins. Under the ICA, argues Halo, 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, asserts Halo; instead, the providing party's cost recovery occurs through reciprocal compensation. *Id.*

Staff Analysis

The charges in dispute are for the AT&T Florida-provided facilities that extend from the end of Halo's facility (for example, at a third party collocation cage where Halo's leased facility terminates) to AT&T Florida's switch ports. (TR 91) While the ICA addresses the POI, it does not indicate that the POI is the point of demarcation for financial responsibility for interconnection facilities. (TR 112) The ICA defines the POI as "the technical interface, the test point(s), and the point(s) for operational division of responsibility between" the parties. (EX 11) While Section IV of the ICA addresses the "Methods of Interconnection," Section VI addresses "Compensation and Billing." Specifically, Section VI.B.2. of the ICA, the portion that addresses two-way interconnection facilities, states:

2. The Parties agree to share proportionately in the recurring costs of two-way interconnection facilities.

a. To determine the amount of compensation due to Carrier for interconnection facilities with two-way trunking for the transport of Local Traffic originating on BellSouth's network and termination on Carrier's network, Carrier will utilize the prior months undisputed Local Traffic usage billed by BellSouth and Carrier to develop the percent of BellSouth originated Local Traffic.

b. BellSouth will bill Carrier for the entire cost of the facility. Carrier will then apply the BellSouth originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by BellSouth to Carrier. Carrier will invoice BellSouth on a monthly basis, this proportionate cost for the facilities utilized by BellSouth.

AT&T Florida argues that the costs of the facilities between Halo and AT&T Florida are shared based upon each carrier's proportional use. (TR 90, 113) Staff agrees. Halo did not dispute that 100% (or very close to 100%) of the traffic between the parties comes from Halo. AT&T Florida originates virtually no traffic to Halo. (TR 115) Since Halo is responsible for 100 percent (or nearly 100 percent) of the traffic, it is responsible for those costs according to the ICA.

In conclusion, in order to interconnect with AT&T Florida, Halo ordered and obtained interconnection facilities from AT&T Florida through a wireless-only ICA. The ICA states that the costs of these interconnection facilities will be shared based upon each carrier's proportional use. Because Halo is responsible for 100% (or nearly 100%) of the traffic that has been exchanged between the Parties, Halo is responsible for the costs of the facilities and trunk groups. The amount of these costs is to be determined by the bankruptcy court.

Issue 6A: Has Halo committed a material breach of its ICA with AT&T Florida?

Recommendation: Yes. Halo Wireless's delivery of non-wireless originated traffic to AT&T Florida for termination clearly constitutes a material breach of the terms of the parties' ICA. (Harris, Curry, Fogleman)

Position of the Parties

AT&T FLORIDA: Yes. Halo has materially breached the ICA and AT&T Florida therefore is entitled to stop performance and to recover access charges on non-local landline traffic and be paid for the facilities it provided.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

AT&T Florida refers to its arguments in Issues 2, 3, and 4 to demonstrate that Halo has materially breached its ICA with Halo Wireless. (BR 37) AT&T Florida asserts that "blackletter law" states that if a party materially breaches a contract, the other party is excused from further performance. *Id.* AT&T Florida avers that Halo's material breach of the ICA, by continuously sending large amounts of landline originated traffic which the ICA does not allow, "defeats the core purpose of the ICA, which was to establish rates, terms, and conditions for wireless originated traffic only." *Id.*

Halo's Argument

In its Prehearing Statement, Halo states that it did not breach the parties' ICA, because all of the traffic it terminated to AT&T Florida came from end user wireless equipment. (Prehearing Statement at 5) Halo further asserts that its insertion of Transcom's information into the charge number field is not a breach of the ICA, since Transcom is the party financially responsible for the calls passing over its trunks to and from AT&T Florida. (Prehearing Statement at 7) Halo asserts that it did not prevent AT&T Florida from being able to properly bill Halo; rather, that the billing between the parties is based on negotiated traffic factors, not call by call data. *Id.* Halo asserts that all the information needed by AT&T Florida was included in the calling data, and that the call detail information accurately portrayed the traffic at issue as "intraMTA," subject to local charges, since Transcom is an Enhanced Service Provider. (Prehearing Statement at 3, 7)

Staff Analysis

As discussed in Issues 2, 3, and 4, staff believes that Halo continuously breached the terms of the parties' ICA by sending non-wireless originated traffic for termination to AT&T Florida, and disguising such traffic to appear to be wireless originated.

Staff believes that the terms of the parties' ICA are clear. Halo was to deliver only wireless-originated traffic for termination to AT&T Florida. Provision (2) of Section 1 of the Amendment to the ICA states:

> Whereas, the Parties have agreed that this Agreement will apply only to (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) traffic that originates through wireless transmitting and receiving facilities before Carrier delivers traffic to AT&T for termination by AT&T or for transit to another network.
> (EX 12, Page 1)

Staff believes this provision is clear on its face: under the ICA, only wireless-originated traffic could be delivered to AT&T Florida for termination. As discussed in Issue 2, staff believes that the record clearly demonstrates that between 45% and 67% of the traffic delivered to AT&T Florida for termination was non-wirelessly originated. Based on the clear and unambiguous language in the ICA, staff recommends that this conduct constitutes a material breach[28] of the parties' ICA. (TR 68)

As previously discussed, staff does not find Halo's arguments that the traffic in question was wirelessly originated persuasive. First, as discussed in Issue 2, regardless of Transcom's ESP status, Transcom was not the party financially responsible for payment to AT&T Florida. Halo delivered traffic to AT&T Florida for termination, pursuant to an ICA. Absent a different agreement with AT&T Florida, staff recommends Halo cannot designate some non-party to the agreement as being financially responsible for the traffic the ICA was entered into to exchange.[29]

Furthermore, the record indicates that Halo's insertion of Transcom's information in the charge number field had the effect of overriding AT&T Florida's billing software, such that the result was to obscure Halo's delivery of non-wireless originated traffic. (TR 22, 159-160) Whether or not such effect was intentional by Halo, such action was clearly unauthorized by the ICA, had the effect of misleading AT&T Florida, and is not a legitimate and permitted action under the terms of the ICA. (TR 192)

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[28] Black's Law Dictionary (8th Ed. 2004) defines a "material breach" as "[a] breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages." This Commission has recently found that withholding disputed charges, contrary to the language of an ICA, constitutes a material breach. *See* Order No. PSC-11-0291-PAA-TP, issued July 6, 2011, in Docket No. 110087-TP, 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.;

[29] See, e.g., Order No. PSC-97-0064-FOF-TP, issued January 17, 1997, in Docket No. 960980-TP, In Re: Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., for arbitration of certain terms and conditions of a proposed agreement with GTE Florida Incorporated concerning interconnection and resale under the Telecommunications Act of 1996. ("We believe that GTEFL should not be permitted to unilaterally modify an agreement reached pursuant to the Act by subsequent tariff filings. One party to a contract cannot alter the contract's terms without the assent of the other parties. United Contractors, Inc. v. United Construction Corp., 187 So.2d 695 (Fla. 2d DCA 1966)").

In summary, Halo's actions clearly had the effect of disguising the traffic delivered to AT&T Florida, such that Halo delivered to AT&T Florida for termination a substantial amount of non-wireless originated traffic. (TR 195-196) Regardless of intent, the effect of Halo's actions was to prevent AT&T Florida from accurately billing for traffic not authorized under the ICA, for the time period it took AT&T Florida to identify, quantify, and petition for permission to stop receiving such traffic. Staff cannot recommend that actions by a party to an ICA, which have these effects, be considered authorized activities under the ICA. Instead, such actions clearly constitute a breach of the fundamental terms of the ICA.

Issue 6B: If Halo has committed a material breach of its ICA with AT&T Florida, is AT&T Florida entitled to terminate the ICA?

Recommendation: Yes. Given the nature of the breach of the ICA, AT&T Florida is entitled to terminate the ICA. (Harris, Curry, Fogleman)

Position of the Parties

AT&T FLORIDA: Yes. Halo has materially breached the ICA and AT&T Florida therefore is entitled to stop performance and to recover access charges on non-local landline traffic and be paid for the facilities it provided.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

See AT&T Florida's argument for Issue 6A.

Halo's Argument

In its Prehearing Statement, Halo did not include a position on Issue 6B. Following direction at the Prehearing, Halo provided a position, which was included in the Prehearing Order. Halo asserts that if the Commission determines in Issue 6A that Halo has materially breached the ICA, Halo stands ready to re-negotiate terms and so come into compliance. Halo maintains that, given the FCC's *Connect America* decision,[30] Halo should be allowed to utilize the ICA's change of law provisions.

Staff Analysis

As previously discussed, AT&T Florida is no longer providing any services to Halo pursuant to the Bankruptcy Trustee's instructions. Halo is in Chapter 7 Bankruptcy Liquidation, with the result that Halo will no longer seek to terminate traffic to AT&T Florida. However, staff recommends that the Commission should determine, based on the record evidence, that AT&T Florida is entitled to terminate the ICA with Halo.

Halo essentially argues that if it did breach the ICA, it should be given an opportunity to renegotiate the terms of a new ICA, utilizing the existing ICA's "change of law" provisions. (TR 59-60) Staff finds Halo's argument unpersuasive. In essence, Halo believes its conduct was permissible under the terms of the ICA prior to the FCC's issuance of the Connect America decision, and as a result of that decision, the ICA's "change of law" provisions should be invoked. (TR 368-369) However, as discussed above, staff does not believe Halo's conduct was ever authorized by the ICA. Staff further does not believe that the FCC's Connect America

[30] *Connect America Order.* See full reference to Order at footnote 16.

decision was in any way a change of law; rather, it made clear that, despite Halo's arguments to the contrary, Halo's business model did not (nor had it ever) provide any exemption from Halo's obligation to pay access charges for non-wireless originated traffic delivered to AT&T Florida for termination in Florida.

If the Commission determines that Halo committed a material breach of the parties' ICA in Issue 6A, staff believes AT&T Florida should be authorized to terminate the ICA. Halo has advanced no argument, nor presented any record evidence, that persuades staff that the ICA should be continued. To the contrary, the facts in this record support the conclusion that AT&T Florida is entitled to terminate the ICA as a result of Halo's material breach.

Issue 6C: If Halo has committed a material breach of its ICA with AT&T Florida, is AT&T Florida entitled to discontinue performance under the ICA?

Recommendation: Yes. Given the nature of the breach of the ICA, and the specific facts contained in the record, the Commission should authorize AT&T Florida to discontinue further performance under the ICA. (Harris, Curry, Fogleman)

Position of the Parties

AT&T FLORIDA: Yes. Halo has materially breached the ICA and AT&T Florida therefore is entitled to stop performance and to recover access charges on non-local landline traffic and be paid for the facilities it provided.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

See AT&T Florida's argument for Issue 6A.

Halo's Argument

See Halo's argument for Issue 6B.

Staff Analysis

Due to the instructions of the Chapter 7 Bankruptcy Trustee, AT&T Florida disconnected Halo Wireless, and stopped accepting traffic from Halo, effective August 1, 2012. However, given the fact that the discontinuance of performance is at the direction of the Bankruptcy Trustee, staff recommends that the Commission should specifically authorize AT&T Florida to discontinue performance under the ICA.

Staff recommends that Halo has materially breached the terms of the ICA. The record does not indicate any serious effort by Halo to cure the breach, or to negotiate a subsequent ICA which would allow Halo to remain in business and continue to terminate traffic to AT&T Florida under terms and conditions acceptable to both parties. Further, staff recommends in Issue 6B that AT&T Florida should be allowed to terminate the parties' Interconnection Agreement. Accordingly, staff recommends that the Commission authorize AT&T Florida to discontinue performance under the Interconnection Agreement with Halo.

Issue 7: What action should the Commission take based on its findings in Issues 1-6?

Recommendation: The Commission should find Halo Wireless breached the terms of the parties' Interconnection Agreement, determine Halo Wireless is liable to AT&T Florida for non-local access and interconnection facilities charges, and authorize termination of the parties' Interconnection Agreement. (Harris, Curry, Fogleman)

Position of the Parties

AT&T FLORIDA: The Commission should: (a) excuse AT&T Florida from further performance under the ICA and find that AT&T Florida may stop accepting traffic from Halo; and (b) find that Halo is liable for access charges on the non-local landline traffic it has sent and the cost of interconnection facilities.

HALO WIRELESS: Halo did not file a Post Hearing Brief. The Staff analysis relies on Halo's positions as articulated in its Prehearing Statement.

Staff Analysis:

AT&T Florida's Argument

In its Brief, AT&T Florida suggests that, as remedies for Halo's breach of the parties' ICA, and to "prevent further harm from continued breaches," the Commission should grant several types of relief. (BR 38) AT&T Florida argues that similar relief has already been granted by the Tennessee, South Carolina, Georgia, Wisconsin, and Missouri Commissions. *Id.* Specifically, AT&T Florida requests that the Commission find that Halo materially breached the terms of the parties' ICA by sending landline originated traffic, inserting incorrect charge number data, and failing to pay for interconnection facilities. *Id.* AT&T Florida avers that as a result of these breaches, the Commission should excuse AT&T Florida from any further performance under the ICA, and that the Commission should determine Halo is liable to AT&T Florida for access charges on the non-local landline traffic Halo delivered to AT&T Florida, as well as interconnection facilities charges for facilities ordered by Halo. *Id.*

Halo's Argument

In its Prehearing Statement, Halo did not include a position on Issue 7. Following direction at the Prehearing, Halo provided the following position: the Commission should deny all relief requested by AT&T Florida.

Staff Analysis

As discussed above, Halo's Bankruptcy proceeding has been converted to a Chapter 7 Liquidation proceeding, and the Bankruptcy Trustee has instructed AT&T to terminate service to Halo in all states. In Florida, AT&T Florida discontinued service to Halo effective August 1, 2012. (BR 1) However, the issue of liability for charges remains, and staff recommends that, as requested by AT&T Florida, this Commission should grant the relief requested by AT&T Florida: find Halo is liable to AT&T Florida for access charges on all non-local traffic Halo

delivered to AT&T Florida, and Halo is liable for all charges for interconnection facilities ordered by Halo, provided by AT&T Florida, and for which Halo has been billed but has not paid.

As pointed out by AT&T Florida in its brief (BR 5), when it remanded these proceedings back to state commissions, the Bankruptcy Court specifically ordered that the Commissions could not determine the amounts of any liability, only that such liability exists.[31] Accordingly, staff recommends that the Commission find that Halo Wireless is liable to AT&T Florida for access charges on all non-local traffic delivered by Halo and terminated by AT&T Florida. Staff further recommends that the Commission find that Halo Wireless is liable to AT&T Florida for charges for interconnection facilities ordered by Halo, for which AT&T Florida has billed Halo and Halo has not paid. Determination of the exact amount due AT&T Florida will be the provenance of the Bankruptcy Court.

[31] "Ordered that, any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion and a decision in respect of such regulatory matters may be rendered, provided however, that nothing herein shall permit, as part of such proceedings: [a]. liquidation of the amount of any claim against the Debtor...." *Order Granting Motion Of The AT&T Companies To Determine Automatic Stay Inapplicable And For Relief From The Automatic Stay*, Chapter 11 Case No. 11-42464-btr-11, In re: Halo Wireless, Inc., U.S. Bankruptcy Court for the Eastern District of Texas, Sherman Division.

Issue 8: Should this docket be closed?

Recommendation: Yes. The docket should be closed after the time for filing an appeal has run. (Harris)

Staff Analysis: The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.