BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Halo Wireless, Inc.	)	
	)	
Complainant,	)	
	)	Case No. TC-2012-0331
v.	)	
	)	
CRAW-KAN TELEPHONE COOPERATIVE, INC., et al.,	)	
	)	
Respondents.	)	

HALO WIRELESS, INC.'S RESPONSE TO MOTION TO DISMISS FILED BY RESPONDENTS ALMA COMMUNICATIONS COMPANY D/B/A ALMA TELEPHONE COMPANY, CHOCTAW TELEPHONE COMPANY, AND MOKAN DIAL, INC.

EXPEDITED RELIEF REQUESTED

COMES NOW Halo Wireless, Inc. ("Halo"), by and through undersigned counsel, and submits to the Missouri Public Service Commission ("Commission") the following response to the motion of Alma Communications Company d/b/a Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial, Inc. (collectively the "Johnson Respondents") to dismiss for lack of compliance with 4 CSR 240-29.130(9) (the "Motion").

I. ALL GROUNDS IN THE COMPLAINT WERE PROPERLY RAISED

1. The Johnson Respondents argue that Halo's Formal Complaint in Response to Blocking Notices ("Complaint") should be dismissed for various alleged procedural defects. But none of these arguments have merit, as discussed below.[1]

2. More broadly, in its introduction, the Johnson Respondents assert that Halo has filed its Complaint for an improper purpose, to seek "declaratory relief asking the Commission to

[1]Halo discusses the Johnson Respondents' arguments in reverse order, as they flow more logically in that sequence.

declare it lacked jurisdiction to adopt the very rule being enforced." Mot. to Dismiss at 3 ¶¶ 8-9. To the contrary, Halo's Complaint does nothing of the kind. While there might well be an argument that the ERE blocking rules are facially invalid in their entirety—even *if* they are correctly construed as applying only to "intrastate traffic in certain circumstances"[2]— Halo's Complaint demonstrates (in part) that the ERE blocking rules *cannot be applied* to Halo or the traffic at issue in any event.

3. It is the Johnson Respondents that have attempted to apply the ERE Rules to Halo. And in order to justify blocking of the traffic at issue, the Johnson Respondents will ultimately have to demonstrate that: (1) the ERE blocking rules are applicable to Halo (*e.g.*, that Halo is an "originating carrier," that application to Halo is not barred by federal law, etc.); (2) that the ERE blocking rules are applicable to the traffic at issue (*e.g.*, that the traffic is LEC-to-

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[2] *See,* Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, WC Docket No. 10-90 et al., FCC 11-161, 26 FCC Rcd. 17663, 17901-17904 (rel. Nov. 18, 2011) (*USF/ICC Transformation Order*), corrected by Erratum (rel. Feb. 6, 2012), modified by Order on Reconsideration (FCC 11-189) (rel. Dec. 23, 2011) clarified by Order, DA-1247 (rel. Feb. 3, 2012),pets. for review pending, *Direct Commc'ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases). The Commission itself bears a heavy burden in the face of the FCC's direct criticism of the ERE rules in ¶ 734 and note 1277:

> 734. Parties also proposed that the Commission allow selective call blocking, which would permit carriers in the call path to block traffic that is unidentified or for which parties refuse to accept financial responsibility. We decline to adopt any remedy that would condone, let alone expressly permit, call blocking. n1277 The Commission has a longstanding prohibition on call blocking. In the 2007 *Call Blocking Order*, the Wireline Competition Bureau emphasized that "the ubiquity and reliability of the nation's telecommunications network is of paramount importance to the explicit goals of the Communications Act of 1934, as amended" and that "Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way." We find no reason to depart from this conclusion. We continue to believe that call blocking has the potential to degrade the reliability of the nation's telecommunications network. Further, as NASUCA highlights in its reply comments, call blocking ultimately harms the consumer, 'whose only error may be relying on an originating carrier that does not fulfill its signaling duties.'

n1277 We note that at least two states currently allow for blocking of intrastate traffic in certain circumstances. See Missouri Commission Section XV Comments at 9; Ohio Commission Section XV Comments at 11-12.This Commission cannot lawfully authorize blocking since it would extend to more than just "intrastate" traffic, and even blocking "only" intrastate traffic would illegally frustrate Halo's federal interconnection rights, which are exclusively subject to the FCC's plenary jurisdiction.

LEC traffic, that blocking the traffic at issue would not be barred by federal law, etc.); and (3) that Halo either failed to properly compensate the Johnson Respondents (and thus that Halo had an obligation to do so) or failed to provide originating caller information. Moreover, at the outset, the Johnson Respondents had the threshold obligation to "clearly indicate" the reasons for blocking in their blocking requests. *See* 4 CSR 240-29.130(4). This obligation necessarily included the obligation to explain why the blocking rules would apply to the entity and traffic in question. But, the Johnson Respondents did not even attempt to justify application of the blocking rules, even *after* Halo gave the Johnson Respondents ample opportunity to "either articulate a basis for application of the ERE Rules or withdraw their Blocking Requests." *Compare* Mot. to Dismiss, Ex. 7 at 4 *with* Mot. To Dismiss, Exs. 1-3.

4. Therefore, in its Complaint, Halo (in addition to challenging the merits of the asserted ERE grounds for blocking) demonstrated that the ERE blocking rules do not, and cannot, apply to Halo or the traffic in question. *Every* issue raised in the Complaint is essential to determining the validity of blocking (including the jurisdictional issues), and *every* issue must be resolved against Halo in order for blocking to be justified.[3]

II. HALO'S REQUEST FOR STAY WAS JUSTIFIED.

5. The Johnson Respondents assert that their blocking requests did not violate the automatic stay, although they do not explain how (even if they are correct) this assertion would in any way justify dismissal of Halo's Complaint. Mot. to Dismiss at 5-6 ¶ 14. However, even if the blocking requests do not violate the stay, the Johnson Defendants still would be unable to

[3] Notably, all of Halo's requests for declarations involve issues that must be decided adversely to Halo in order for blocking to be justified. However, even if some of the requests were broader than that, it would in no way justify dismissal of the Complaint, as this Commission's rules expressly provide that "[a]ll matters upon which a complaint maybe founded may be joined in one (1) hearing and no motion for dismissal shall be entertained against a complainant for misjoinder of causes of action or grievances . . . ." 4 CSR 240-2.070.

show that Halo is an "originating carrier" under the definition of the ERE Rules, that the Commission could validly block traffic that is interstate and IP-originated in nature, that Respondents are entitled to the compensation they have sought, that Halo has altered originating caller information, etc.

6. Moreover, even if this argument could provide some basis for dismissal of the Complaint, which is denied, Halo maintains that that is invocation of the protection of the automatic stay is proper and that no blocking may proceed against Halo without a determination by the Bankruptcy Court that the blocking notices and these proceedings are within the scope of the Bankruptcy Court's order finding certain proceedings outside the protection of the stay (the "Stay Order."

7. As set forth more fully in Halo's Reply to the various Respondents' Responses to Request for Stay Pending Bankruptcy Determination filed contemporaneously herewith (which Reply is incorporated herein by reference), the automatic stay is by statute is "automatic." *See* 11 U.S.C. § 362. Although the Stay Order permits some proceedings before state commissions to proceed, the Stay Order expressly excludes "any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor." The Stay Order requires a party seeking to pursue such an action to first seek relief from the Bankruptcy Court but only after "a state commission has (i) first determined that it has jurisdiction over the issues raised in the State Commission Proceedings; and (ii) then determined that the Debtor has violated applicable law over which the particular state commission has jurisdiction." *See* Stay Order, p. 2, ¶ 2. The Respondents' clearly seek to affect the debtor/creditor relationship between Halo and AT&T by requesting blocking of the performance of AT&T under the ICA between AT&T and

Halo. Thus, the blocking notices and Halo's Complaint clearly fall within the portion of the Stay Order requiring them to seek relief from the Bankruptcy Court before proceeding.

8. Halo is not requesting this Commission to impose a stay beyond the automatic stay already imposed by 11 U.S.C. § 362 and the Stay Order. Instead, Halo is merely asking the Commission to abide by the automatic stay unless and until the Respondents to seek and obtain relief from the stay in the Bankruptcy Court as required by the Stay Order. Accordingly, there is nothing improper about Halo's assertion of the protection of the automatic stay, and the Commission should stay this proceeding until Respondents obtain relief from the stay in the Bankruptcy Court.

III. HALO DID REQUEST EXPEDITED RELIEF.

9. The Johnson Respondents assert that the Complaint should be dismissed on the ground that Halo did not request expedited relief. Mot. to Dismiss at 5 ¶ 13. To the contrary, Halo requested expedited relief in paragraphs 60 and 61, and in its prayer for relief:

- 60. Moreover, regardless of the provision section 362, the Respondents' blocking notices violate the Bankruptcy Court's Stay Orders. More specifically, the Stay Orders explicitly prohibit "any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor." *See* Exhibits E and F. As such, the Stay Orders and the Bankruptcy Code expressly prohibit further activity in this action unless and until the Bankruptcy Court lifts the automatic stay specifically to allow this action to proceed. Halo in no way waives the automatic stay by filing this action to prevent self-help unlawful blocking by Respondents. To the contrary, Halo requests that the Commission affirm, on an expedited basis, that this action is stayed until the Bankruptcy Court rules on the propriety of the blocking notices.

- 61. Alternatively, if the stay is lifted, or determined to be inapplicable in this action, then Halo seeks expedited consideration of the blocking notices, per 4 CSR 240-29.120(5) and -29.130(9). In such case, the blocking notices should be denied for the reasons set forth below.

- WHEREFORE, PREMISES CONSIDERED, Halo prays:
    - A. That the Commission affirm, on an expedited basis, that this action is stayed until the Bankruptcy Court rules on the propriety of the blocking notices;
    - B. In the alternative, if the stay is lifted, or determined to be inapplicable in this action, that Commission grant expedited consideration of the blocking notices and this Complaint, per 4 CSR 240-29.120(5) and -29.130(9).

Complaint at 20-21, 41.

10. To the extent that the Johnson Respondents are complaining that expedited consideration of the merits is requested only as alternate relief if this action is not stayed, that argument is without merit. As discussed above, Halo has a legitimate basis for contending that Respondents' self-help remedies violate the bankruptcy stay. Whether or not Respondents (or even this Commission) disagree with that contention, Halo certainly has the right to make its argument, particularly since the Fifth Circuit is currently reviewing the Bankruptcy Court's initial decisions to lift the stay in the first instance. Nothing in the ERE Rules can be construed as requiring Halo to waive its right in order to respond to Respondents' blocking attempt. And, if the ERE Rules could be read as imposing such requirement, they would violate Halo's right to due process of law.

11. Alternatively, the Johnson Respondents may be complaining that Halo's Complaint fails to comply with certain procedural rules for requests for expedited relief, such as including the request for expedited consideration in the caption. However, such an argument would provide no basis for dismissal. To the contrary, the Commission has already made it clear that it recognized the nature of Halo's expedited request, and that it is granting such request, by virtue of its order requiring an expedited response to the Johnson Respondents' motion to

dismiss. Nevertheless, to avoid any dispute on the issue, Halo is contemporaneously filing a First Amended Complaint that includes the request for expedited relief in the caption and otherwise attempts to ensure compliance with the Commission's rules.

IV. HALO DID REFUTE THE STATED REASONS FOR BLOCKING.

12. The Johnson Respondents contend that Halo did not refute the "stated reasons" for blocking. Mot. to Dismiss at 4-5 ¶¶ 11-12. However, as noted above in the opening section, the Johnson Respondents' "stated reasons" are wholly inadequate to justify blocking. In each blocking request, the reasons consist of a single paragraph of mostly conclusory allegations, with no explanation as to how each allegation demonstrates that blocking is justified under the limited grounds of the ERE blocking rules. *See* Mot. to Dismiss, Exs. 1-3. Moreover, each of the blocking requests wholly fails to "clearly indicate" how the ERE blocking rules are even applicable to Halo or the traffic in question. Therefore, to the extent Halo's arguments do not directly address to the "stated reasons," that is because the "stated reasons" were inadequate in the first instance.

13. In any event, Halo has refuted the stated reasons for blocking. Halo addressed the FCC's order and the related arguments; it demonstrated that the Johnson Defendants are not entitled to any compensation from Halo, much less the compensation sought in their invalid invoices; etc. Halo also properly raised pertinent and fundamental questions regarding whether the traffic is indeed "LEC-to-LEC" traffic under the ERE Rules. *See* 4 CSR 240-29.020(18) (defining "LEC-to-LEC" traffic); 240-29-130(allowing blocking of "LEC-to-LEC" traffic of "originating carriers").

14. And, of course, all of the "stated reasons" for blocking are necessarily refuted by the fact that the ERE Rules do not, and cannot, apply to Halo and the traffic at issue, by virtue of both the language of the rules themselves and the fact that they would be preempted by federal law if that were not the case.

V. HALO DID FILE ITS COMPLAINT "IMMEDIATELY" UNDER THE CIRCUMSTANCES.

15. The Johnson Defendants contend that the "Complaint was not filed 'immediately' after Halo determined it would dispute the blocking," on the ground that Halo waited eighteen (18) days after sending a letter informing the Johnson Respondents that it disputed the blocking request. *See* Mot. to Dismiss at 3 ¶ 10. To the contrary, the Johnson Respondents' blocking requests (in addition to other defects) wholly failed to include any "stated reasons" for applying Rule 240-29.130 to either Halo or to its traffic. *See* Mot. To Dismiss, Exs. 1-3. Halo's March 15 letter pointed this out this deficiency and explained that the ERE Rules did not, and could not, apply to either Halo or to the most of the traffic at issue. *See* Mot. to Dismiss, Ex. 7. Accordingly, Halo gave the Johnson Respondents (as well as the England Respondents and AT&T Missouri) the opportunity to "either articulate a basis for application of the ERE Rules or withdraw their Blocking Requests by March 30, 2012." *See* Mot. to Dismiss, Ex. 7 at 4. But, Halo received no response to its letter. Accordingly, Halo filed the instant Complaint on April 2, 2012, exactly ***one business day*** after the expiration of the offer in its letter.

16. Under these circumstances, Halo's Complaint was indeed filed "immediately." "Immediately" is not defined in the ERE Rules, but the ordinary meaning of "immediate" is "[a] reasonable time in view of particular facts and circumstances of case under consideration." *Bateman v. Rinehart*, No.WD 73947, 2012 WL 538946, *9 (Mo. App. W.D. February 21, 2012)

(quoting BLACK'S LAW DICTIONARY 749 (6th ed.1990)); *see also, e.g.*, *Becker v. Lockhart*, 971 F.2d 172, 174-75 (8th Cir. 1992).

17. Under the circumstances above, as well as the circumstances of Halo's pending bankruptcy, it was entirely reasonable for Halo to give the Johnson Respondents an opportunity to either justify the application of the ERE Rules to Halo or to withdraw their requests. Moreover, even if the Complaint was not filed "immediately," the Johnson Respondents provide no argument that would justify dismissal of the Complaint on that basis.

VI. CONCLUSION

The Johnson Respondents' arguments are without merit, as discussed above. Therefore, their motion should be denied, and (if this proceeding is not stayed) this Commission should deny all of the blocking requests in accordance with the arguments raised in Halo's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been filed with the Missouri Public Service Commission electronic filing system and has been e-mailed to the following counsel of record this 9th day of April, 2012:

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