BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

ALMA COMMUNICATIONS COMPANY D/B/A ALMA TELEPHONE COMPANY; CHARITON VALLEY TELEPHONE CORPORATION; CHARITON VALLEY TELECOM CORPORATION; CHOCTAW TELEPHONE COMPANY; MID-MISSOURI TELEPHONE COMPANY, A CORPORATE DIVISION OF OTELCO, INC.; AND MOKAN DIAL, INC.,	§	CASE NO. TO-2012-0035
COMPLAINANTS	§	
v.	§	
HALO WIRELESS, INC. and SOUTHWESTERN BELL TELEPHONE COMPANY, D/B/A AT&T MISSOURI	§	
RESPONDENTS	§	

HALO WIRELESS, INC.'S RESPONSE TO COMPLAINANTS' APPLICATION FOR REJECTION OF PORTIONS OF AN INTERCONNECTION AGREEMENT

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 Complainants' Application for Rejection of Portions of an Interconnection Agreement ("Application"):

I. Introduction.

The Complainants cannot bring the present Application because the interconnection agreement at issue has already been approved by the Commission and is now in effect. Section 252(e)(2)(A) of the Telecommunications Act (the "Act"), which the Complainants cite as the legal basis for their Application, relates only to the 90-day review process of section 252(e)(1), which has long since passed.[1] Section 252(e)(2)(A) is not a vehicle for appealing the approval of

[1] 47 U.S.C. § 252(e)(1)-(2).

an ICA, and it does not authorize the Commission to rescind the approval of an ICA it has already considered. Section 252(e)(6) does authorize aggrieved parties to challenge the approval of an ICA, but section 252(e)(6) vests exclusive jurisdiction with the federal courts, not state commissions. The Complainants' one and only opportunity to seek the rejection of the ICA at the Commission was during the section 252(e)(1) review period, before the ICA was approved, but they failed to do so. They cannot now turn back the clock, ask the Commission to resurrect the review process, and request that an existing ICA be rejected. The Commission has already ruled that the ICA does not discriminate against the Complainants and that it is not inconsistent with the public interest, convenience, and necessity. Therefore, the Application is without merit and must be denied.

II. Procedural History.

Halo is a telecommunications carrier that provides wireless services pursuant to its Radio Station Authorization ("RSA"), a nationwide license granted by the Federal Communications Commission ("FCC"), which permits Halo to register and operate fixed base stations and to support mobile, portable and fixed subscriber stations throughout the country. Halo's RSA classifies Halo as a "common carrier."

On August 19, 2010, this Commission issued an order approving of a 251/252 wireless interconnection agreement (the "ICA") between Halo and Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T").[2] As a result, Halo provides "interconnected service," as defined in section 332(d)(2) of the Telecommunications Act of 1996 (the "Act"). Thus, as a matter of law, Halo is a provider of "commercial mobile service," as defined in

[2] *See* Order Approving Interconnection Agreement, File No. IK-2010-0384, Missouri Public Service Commission, (Aug. 19, 2010).

section 332(d)(1) of the Act, and is a "Commercial Mobile Radio Service" ("CMRS"). *See* 47 C.F.R § 20.3.

Shortly after they began receiving traffic from Halo through AT&T, various local exchange carriers ("LECs") across the country began demanding that Halo pay them access charges and other charges for the termination of that traffic. The LECs sent various demand letters to Halo making this demand. Halo rejected the demands, however, because they were procedurally improper and because they made demands for access charges that were not due and other charges that were not due, absent compliance with 47 C.F.R. § 20.11.

On August 1, 2011, the Complainants filed their Application with the Commission initiating the instant proceeding. The Application alleges that various terms of the ICA are discriminatory toward third parties, and further, that various actions by Halo under the ICA have the same discriminatory effect.

On August 8, 2011, Halo filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division (the "Bankruptcy Court"), Case No. 11-42464 (the "Bankruptcy Case"). On September 1, 2011, Halo filed Adversary Proceeding No. 11-04160, *Halo Wireless, Inc. v. The Livingston Telephone Company, et al.*, in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division (the "Central Adversary"), naming various similarly situated parties involved in similar disputes over the same FCC-exclusive issues with Halo.

In connection with the filing of the Bankruptcy Case and the Central Adversary, Halo removed this proceeding to the United States District Court for the Western District of Missouri, Central Division, pursuant to 28 U.S.C. §1452(a). The matter was remanded on December 22, 2011.

III. The Complainants cannot appeal an order approving an ICA under section 252(e)(2)(A). Instead, section 252(e)(6) authorizes appeals of ICA approvals in the federal courts.

In Commission's order approving the ICA, the Commission held that, "[b]ased upon its review of the Agreement between AT&T Missouri and Halo and its findings of fact, the Commission concludes that the Agreement is neither discriminatory nor inconsistent with the public interest and shall be approved."[3] That order was the culmination of the section 252(e)(1)-(2) statutory review process, in which Commission staff carefully examined and evaluated the proposed ICA. Staff then recommended approval, and after further consideration by a Commission regulatory law judge, the ICA was ultimately ordered approved.

In bringing this Application, the Complainants are functionally attempting to appeal the Commission's August 19, 2010 order. The Application implicitly asks the Commission to overturn that order and find that it erred when it held that the ICA is neither discriminatory nor inconsistent with the public interest. The Act, however, does not authorize the Complainants to appeal an order approving an ICA at the Commission.

The Complainants cite 47 U.S.C. § 252(e)(2)(A) as the basis for the Application and the grounds for rejecting the ICA.[4] They contend that the ICA's standard transiting terms (and transit in general) discriminate against other carriers that are indirectly interconnected with the originating carrier and conflict with the public interest.[5]

While section 252(e)(2)(A) does authorize the Commission to reject a negotiated ICA if it discriminates against third party carriers or is inconsistent with the public interest, this

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[3] *Id* at p. 3.

[4] *See* Application at ¶ 32.

[5] *See id* at ¶¶ 27-31.

subsection only applies to the 90-day statutory review process of section 252(e)(1).[6] A plain reading of these consecutive subsections makes clear that section 252(e)(2)(A) merely establishes the two grounds for rejecting an ICA that is under consideration for approval. This is confirmed by Commission Rule 4 CSR 240-36.050(4), which cites section 252(e)(2)(B) (the equivalent of section 252(e)(2)(A) for arbitrated ICAs), as the Commission's standard of review when approving ICAs.

The ICA at issue here, however, has already successfully completed the section 252(e)(1)-(2) approval process and has been in effect for well over a year. This was a public process that allowed the Complainants the opportunity to oppose the ICA and argue to the Commission why they feel it should be rejected. The Complainants failed to avail themselves of this right. The Commission's staff and regulatory law judge, however, duly considered the effect of the ICA on third party carriers and the public interest when it was determined that the ICA should be approved.

Section 252(e)(2)(A) does not authorize challenges to existing ICAs, nor does it grant state commissions the authority to rescind previous decisions to approve or reject an ICA. In any event, under section 252(e)(4), the Commission was divested of its authority to reject the ICA ninety days after submission.[7] This statutory deadline would be rendered meaningless if, as the

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[6] *See MCI Telecomms. Corp. v. BellSouth Telcomms., Inc.*, 1997 U.S. Dist. LEXIS 23883, 3-4 (N.D. Fla. Nov. 20, 1997) ("The Act provides further that any interconnection agreement adopted by negotiation or arbitration must be submitted to the state regulatory authority for approval. 47 U.S.C. § 252(e)(1). The Act provides standards to be applied and procedures to be followed by the state regulatory authority in determining whether to approve any such agreement. See, e.g., 47 U.S.C. § 252(e)(2) & (4)."); *Verizon N.Y., Inc. v. Covad Communs. Co.*, 2006 U.S. Dist. LEXIS 7414 (N.D.N.Y Feb. 3, 2006) ("An agreement reached through arbitration [or negotiation] must then be submitted for final approval by the State commission, which can reject it for failure to comply with the terms of section 251 or FCC-enacted regulations. 47 U.S.C. § 252(e)(1)-(2).").

[7] "If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after

Complainants contend, the Commission could go back in time and reopen the section 252(e)(1)-(2) process in order to hear an appeal that could have been brought as an opposition when the ICA was under review. By operation of section 252(e)(4), the Commission's statutory authority to entertain objections to the ICA has expired, and the Commission cannot take the action sought by the Complainants.[8]

Instead, it is section 252(e)(6) that establishes the procedure to challenge a prior Commission order approving an ICA. Under this subsection, "any party aggrieved by such a determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). This process of state commission approval or rejection and federal court review of such decisions is clearly delineated by the Act and well-settled.[9] One federal court concisely explained this approval and review process as such:

> The Act instructs that agreements adopted through arbitration or negotiation be submitted to the state commission for review, and the commission may then approve the agreement or reject it if it is inconsistent with the Act. Id. § 252(e)(1)-(2). If the commission fails to act, the agreement will be deemed approved. Id. §

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submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved." 47 U.S.C. § 252(e)(4).

[8] *Harter v. Missouri Public Service Com'n*, --- S.W.3d ----, 2011 WL 6187041 (Mo.App. W.D. 2011)(upholding the Commission's position that it lacked statutory authority to consider a motion for rehearing because the complaining party did not seek relief within the prescribed period); *see also Ground Freight Expeditors, LLC v. Binder*, --- S.W.3d ----, 2011 WL 6755854 at *2-3 (Mo.App. W.D. 2011)(explaining the distinction between subject matter jurisdiction and the statutory authority to act).

[9] *See e.g., GTE South v. Morrison*, 957 F. Supp. 800, 804 (E.D. Va. 1997) ("Section 252 sets out a four-stage approach to developing an interconnection agreement: First, voluntary negotiations for the first 135 days, § 252(a); Second, arbitration of the unresolved issues commencing during the 135th to 160th day and concluded by the State commission within nine months of the first interconnection agreement request, § 252(b); Third, approval or rejection by the State commission, § 252(e)(1)-(4); and Fourth, review of State commission actions, § 252(e)(6)."); *Verizon Md., Inc. v. Core Communs., Inc.*, 631 F. Supp. 2d 690, 692 (D. Md. 2009) ("A proposed ICA must then be submitted to the state commission for its review and approval. Id. § 252(e)(1)-(2). Any party aggrieved by a 'determination' of a state commission under Section 252 may bring an action in the appropriate federal district court 'to determine whether the agreement or statement meets the requirements' of Sections 251 and 252. Id. § 252(e)(6)."); *AT&T Communs. of the Midwest, Inc. v. Contel of Minn., Inc.*, 1998 U.S. Dist. LEXIS 22996 (D. Minn. Apr. 30, 1998); *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 633 (S.D. Ind. 1998).

> 252(e)(4). Once a state commission has approved or rejected an interconnection agreement, 'any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section.' Id. § 252(e)(6).[10]

Making absolutely clear that the federal courts have jurisdiction over an appeal of a Commission order approving an ICA, section 252(e)(6) was specifically incorporated into the Commission's rules at 4 CSR 240-36.050(6).

The federal courts' jurisdiction over section 252(e)(6) actions is exclusive and this Commission cannot even entertain the Application.[11] Jurisdiction was purposefully conferred on the federal courts by the Act in order to "facilitate more uniform interpretation of the federal statutory scheme."[12] In so doing, Congress "conditioned state participation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions."[13] Thus, if these proceedings are considered an attempt to re-open the public comment period of the initial approval process, it is clear the Commission lacks the authority to act because the Complainants have waited too long. If these proceedings are considered an attempt to seek review of the initial approval, the subject matter

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[10]*See AT&T Communs., Inc. v. Michigan Bell Tel. Co.*, 60 F. Supp. 2d 636, 638 (E.D. Mich. 1998).

[11]*Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 803-804 (8th Cir. 1997) ("[S]ubsection 252(e)(6) directly provides for federal district court review of state commission determinations when parties wish to challenge such determinations. 47 U.S.C.A. § 252(e)(6). [...] Although the terms of subsection 252(e)(6) do not explicitly state that federal district court review is a party's 'exclusive' remedy, courts traditionally presume that such special statutory review procedures are intended to be the exclusive means of review. We afford subsection 252(e)(6) our traditional presumption and conclude that it is the exclusive means to attain review of state commission determinations under the Act."); *Wisconsin Bell v. PSC*, 27 F. Supp. 2d 1149, 1154 (W.D. Wis. 1998) ("Under the Act, federal judicial review is the sole remedy to correct errors in determinations related to interconnection agreements."); *AT&T Communs., Inc. v. Michigan Bell Tel. Co.*, 60 F. Supp. 2d 636, 640 (E.D. Mich. 1998) ("There is 'no state forum available to vindicate' a telecommunication carrier's claim that an interconnection agreement violates the Act. See 47 U.S.C. § 252(e)(4)."); *AT&T Communs. of the Midwest, Inc. v. Contel of Minn., Inc.*, 1998 U.S. Dist. LEXIS 22996 (D. Minn. Apr. 30, 1998); *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 297 (4th Cir. Md. 2001); *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 302 (4th Cir. Md. 2001); *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 512 (3d Cir. Pa. 2001).

[12]*See In the Matter of Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, 16 FCC Rcd 6231, 6234 (FCC 2001).

[13]*See US West Communs., Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997).

jurisdiction for such an appeal lies solely in the federal courts, and not with the Commission. In either event, the Commission has no power to overturn or rescind its approval of the ICA, and any action that seeks to do so must be brought in federal court.

IV. The Complainants' allegations are baseless and the Application must be denied.

In the Application, the Complainants make a number of unfounded and baseless allegations of misconduct by Halo. Halo denies these allegations in their entirety. In the first instance, the ICA's transiting provisions are standard terms commonly found in many ICAs. Transit service is entirely lawful and has not been found by any competent tribunal to be discriminatory or inconsistent with the public interest. Indirect interconnection does not disadvantage the Complainants or place them in an inferior position in any way.[14] If they so choose, the FCC's rules authorize the Complainants to request interconnection with Halo, something they have thus far refused to correctly do.[15] That is the proper procedure for addressing the Complainants' apparent concerns, not requesting that the Commission reject industry-standard transiting terms in an already-approved ICA.

The Complainants allege that Halo has breached section 3.1.3 of the ICA by not requesting interconnection with them prior to originating traffic to their networks.[16] Section 3.1.3, however, is permissive and it does not require that Halo always first negotiate or arbitrate an ICA prior to sending any traffic to a third party carrier. The Complainants' argument, if accepted, would mean that transit service and indirect interconnection is prohibited by the ICA because this service is only utilized with carriers for which Halo does not have an ICA. This position is plainly contradicted by the fact that the ICA contains rates and terms for transit

[14] *See* Application at ¶ 28.

[15] *See* 47 C.F.R. § 20.11(e).

[16] *See* Application at ¶¶ 22-24.

service, all of which would be meaningless if section 3.1.3 forbids transit.[17] Instead, section 3.1.3 clearly states that Halo is not required to obtain ICAs with third party carriers because it permits Halo to choose to utilize transit service so long as it indemnifies AT&T. In any event, the Complainants are neither parties nor beneficiaries to the ICA, and they cannot bring an action seeking its enforcement.[18]

The Complainants have also alleged that Halo is involved in an access avoidance scheme when it originates calls to their networks via AT&T.[19] This is patently untrue as Halo's operations are entirely lawful. If the Complainants truly believe that Halo is operating outside the law, then the law provides various avenues for redress.[20] The Complainants cannot bring an application to reject an existing ICA to the Commission for any reason, and they certainly cannot do so to disguise a claim for violating the Act.

V. Conclusion.

The Act allowed the Complainants an opportunity to challenge the ICA during the approval process. The Complainants failed to do so. This Commission duly reviewed the ICA, and in approving the ICA, ruled that it is neither discriminatory nor inconsistent with the public interest, convenience, and necessity. Section 252(e)(2)(A) does not allow the Complainants to resurrect the review process and request that an existing ICA be rejected. The Commission has not been granted the jurisdiction to hear an appeal of its order or the authority to rescind its approval. Instead, section 252(e)(6) establishes the procedure for challenging the lawfulness of an existing ICA. Section 252(e)(6), however, confers exclusive jurisdiction with the federal

[17] *See e.g.* Interconnection Agreement at §§ 3.1.3, 3.3.1, and Pricing Appendix § 1.0.

[18] *See id* at § 18.5 ("This Agreement shall not provide any non-party with any remedy, claim, cause of action or other right.").

[19] *See* Application at ¶ 25.

[20] *See e.g.* 47 U.S.C. § 208.

courts, not the state commissions. The present Application is entirely without merit and should be dismissed for good cause under Commission Rule 4 CSR 240-2.116(4).

WHEREFORE, for the foregoing reasons, Halo respectfully requests that the Commission issue an order denying and dismissing the Complainants' Application for Rejection of Portions of an Interconnection Agreement.

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 31st day of January, 2012:

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