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 OPPOSITION TO APPLICATION TO INTERVENE

COMES NOW Halo Wireless, Inc. ("Halo"), by and through undersigned counsel, and submits to the Missouri Public Service Commission ("Commission") the following opposition to the Small Telephone Company Group's ("STCG") Application to Intervene ("Application"):

I. Introduction.

The Application should be denied because STCG has failed to assert a claim for relief that can be granted by the Commission, STCG has no interest that may be adversely affected by the outcome of the instant matter, and STCG's intervention would not serve the public interest. Halo contends that the instant matter actually raises issues and seeks relief which the Commission has no authority to grant, as interconnection agreements cannot be reviewed and rejected by state commissions after the passage of the 90-day review period, as outlined in 47 U.S.C. § 252(e). As such, STCG has no right that will be affected adversely by this proceeding,

as it has no right to petition the Commission to reject an interconnection agreement in this present matter. Also, it is clear that STCG's claims that allowing the intervention of STCG in the present matter would serve the public interest are baseless, as the public has no interest in seeing that STCG or the Complainants in this present matter are able to appeal an interconnection agreement when it is not appealable. Accordingly, there are no legitimate grounds for permitting SCTC to participate in this proceeding, and the Application should 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").[1] 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 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

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

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 Petition for Rejection of Portions of an Interconnection Agreement (the "Complaint") with the Commission initiating the instant proceeding. The Complaint 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. STCG cannot appeal an order approving an ICA before the Commission. As such, it has no right that may be adversely affected by a final order from this present matter, and the Application should be denied.

The Complainants filed the Complaint in order to petition the Commission to reject certain provisions of the ICA between Halo and AT&T. STCG is attempting to join in that effort

through this Application. However, there are no grounds by which the Commission may provide this relief.

The ICA was ordered approved by this Commission, as previously noted, on August 19, 2010. In bringing the Complaint to reject all or portions of the ICA, the Complainants were functionally attempting to appeal the Commission's August 19, 2010 order. The Complaint and this Application implicitly ask 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 or STCG 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 their Complaint and the grounds for rejecting the ICA.[2] 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.[3]

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 subsection only applies to the 90-day statutory review process of section 252(e)(1).[4] A plain reading of these consecutive subsections makes clear that section 252(e)(2)(A) merely

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[2]*See* Application for Rejection of Portions of an Interconnection Agreement at ¶ 32.

[3]*See id* at ¶¶ 27-31.

[4]*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. CovadCommuns. 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).").

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 agreements.

The ICA, however, has already successfully completed the section 252(e)(1)-(2) approval process and that approval has been in effect for well over a year. This was a public process that allowed the Complainants, as well as STCG, the opportunity to oppose the ICA and argue to the Commission why they feel it should be rejected. The Complainants and STCG 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 agreement. In any event, under section 252(e)(4), the Commission was divested of its authority to reject the ICA ninety days after submission.[5] This statutory deadline would be rendered meaningless if, as the 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 proposed intervenors, STCG.[6]

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[5] "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 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).

[6] *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

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.[7] 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. § 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).[8]

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).

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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).

[7]*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).

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

The federal courts' jurisdiction over section 252(e)(6) actions is exclusive and this Commission cannot even entertain the Complaint or this Application.[9] Jurisdiction was purposefully conferred on the federal courts by the Act in order to "facilitate more uniform interpretation of the federal statutory scheme."[10] 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."[11] 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 STCG has waited too long. If these proceedings are considered an attempt to seek review of the initial approval, the subject matter 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 at this time any action that seeks to do so must be brought in federal court

In the Application, STCG offers no distinct legal argument from the Complainants and no indication that any action they would take would be anything other than the same actions the Complainants would take. Since the Complainants do not have the right to appeal the ICA

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[9]*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).

[10]*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).

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

before the Commission, as outlined above, neither does STCG. As such, STCG has no interest that may be adversely affected by a final ruling in this matter.

IV. Granting the Application does not serve the interest of the public, and therefore, the Application should be denied.

STCG claims that granting the Application will serve the public interest, as the STCG member companies have many years of expertise in the regulatory and technical requirements for providing telecommunications in rural Missouri. This may be true, but it is irrelevant. Just because a party has extensive experience in an area does not mean that it should have the right to intervene in any matter concerning the area in the name of the public interest. This matter is about private companies being able to collect access charges when they are not rightfully due, something that is not in the public interest.

STCG also contends that granting intervention would serve the public interest because it will advance judicial economy by avoiding the need for STCG to file its own separate complaint and request to consolidate. Judicial economy would be better served by the speedy conclusion of this matter, and requiring both the Complainants and STCG to follow the lawful process for appealing an already approved ICA.

WHEREFORE, for the foregoing reasons, Halo respectfully requests that the Commission issue an order denying and dismissing STCG's Application for Intervention.

Respectfully submitted,

LOUIS A. HUBER, III
Missouri State Bar No. 28447
SCHLEE, HUBER, MCMULLEN & KRAUSE, P.C.
4050 Pennsylvania, Suite 300
P.O. Box 32430
Kansas City, MO 64171-5430
Telephone: (816) 931-3500
Facsimile: (816) 931-3553

STEVEN H. THOMAS
(pro hac vice admission)
Texas State Bar No. 19868890
TROY P. MAJOUE
(pro hac vice admission)
Texas State Bar No. 24067738
MCGUIRE, CRADDOCK & STROTHER, P.C.
2501 N. Harwood, Suite 1800
Dallas, TX 75201
Telephone: (214) 954-6800
Facsimile: (214) 954-6850

W. SCOTT MCCOLLOUGH
(pro hac vice admission)
Texas State Bar No. 13434100
MCCOLLOUGH|HENRY, P.C.
1250 S. Capital of Texas Hwy, Bldg 2-235
West Lake Hills, TX 78746
Telephone: (512) 888-1112
Facsimile: (512) 692-2522

Attorneys for Halo Wireless, Inc.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed via U.S. Mail, hand-delivered, transmitted by facsimile or by electronic mail to the following counsel of record on this 30th day of January, 2012:

Craig S. Johnson
Johnson & Sporleder, LLP
304 E. High St., Suite 200
P.O. Box 1670
Jefferson City, Missouri 65102

Leo J. Bub, General Attorney
AT&T Missouri
One AT&T Center, Room 3518
St. Louis, Mo 63101

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

LOUIS A. HUBER, III