Exhibit K to AT&T Illinois' Memorandum In Opposition to Halo's Partial Motion to Dismiss

Exhibit K

Louisiana Public Service Commission

POST OFFICE BOX 91154
BATON ROUGE, LOUISIANA 70821-9154

Telephone 225-342-9888

COMMISSIONERS

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Deputy Undersecretary

April 20, 2012

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LA PUBLIC SERVICE COMMISSION

Ms. Terri Lemoine
Louisiana Public Service Commission
Docketing Division
P. O. Box 91154
Baton Rouge, LA 70821

Docket No. U-32237 – In Re: Petition of BellSouth Telecommunications, LLC d/b/a AT&T Louisiana Seeking Relief from Breaches of Interconnection Agreement with Halo Wireless, Inc.

Dear Ms. Lemoine:

Please file the attached Commission Staff's Memorandum in Opposition to Halo Wireless Inc.'s Partial Motion to Dismiss Counts I through III on behalf of the Commission Staff in the above referenced docket.

If you have any questions, feel free to contact me at 225-342-3034.

Sincerely,

Jeffery Valliere
LPSC Staff Attorney

JV/lb
cc: Commissioners
Service List

LOUISIANA PUBLIC SERVICE COMMISSION

STATE OF LOUISIANA

2012 APR 20 PM 1:
LA PUBLIC SERVICE COMMISSION

BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T LOUISIANA

VERSUS **DOCKET NO. U-32237**

HALO WIRELESS, INC.

In Re: Petition of BellSouth Telecommunications, LLC d/b/a AT&T Louisiana Seeking Relief from Breaches of Interconnection Agreement with Halo Wireless, Inc.

COMMISSION STAFF'S MEMORANDUM IN OPPOSITION TO HALO WIRELESS INC.'S PARTIAL MOTION TO DISMISS COUNTS I THROUGH III

Now into Court, through undersigned counsel, comes the Louisiana Public Service Commission Staff (hereinafter "Commission Staff" or "Staff"), who submit the following Memorandum in Opposition to Halo Wireless Inc.'s Partial Motion to Dismiss Counts I through III of the Petition of Bellsouth Telecommunications, LLC d/b/a AT&T Louisiana. For the reasons set forth below, Halo's Partial Motion to Dismiss should be denied.

A. Background Facts

On February 10, 2012, Bellsouth Telecommunications, LLC d/b/a AT&T Louisiana ("AT&T") filed a Petition requesting an Order from the Louisiana Public Service Commission ("Commission") excusing AT&T from further performance under its wireless interconnection agreement ("interconnection agreement") with Halo Wireless, Inc. ("Halo") based upon alleged material breaches on the part of Halo under the interconnection agreement. The Petition alleged that in March and April, 2010, AT&T and Halo executed an interconnection agreement, which adopted an earlier interconnection agreement between T-Mobile USA, Inc. and AT&T.

(Petition, Paragraph 4). Within the Petition, AT&T alleges four (4) counts against Halo. Count I (Paragraphs 5-8) alleges that Halo sent wireline-originated traffic to AT&T in contravention of the interconnection agreement. Count II (Paragraphs 9-12) alleges Halo breached the interconnection agreement by altering or deleting call information that Halo delivered to AT&T. Count III (Paragraphs 13-14) alleges that the landline originated traffic sent from Halo to AT&T is subject to switched access charges. Lastly, Count IV (Paragraphs 15-18) alleges that Halo has refused, without lawful justification, to pay bills related to transport facilities that Halo has ordered from AT&T.

On March 13, 2012, Halo filed by facsimile a Notice of Protest, Partial Motion to Dismiss Counts I through III and Answer to the Petition of AT&T. ("Partial Motion to Dismiss"). The Partial Motion to Dismiss, which is addressed in greater detail *infra*, requests dismissal of Counts I through III based in part on an alleged lack of subject matter jurisdiction on the part of the Louisiana Public Service Commission.

Also on March 13, 2012, the Small Company Committee of the Louisiana Telecommunications Association ("Small Company Committee") filed a Notice of Intervention. Thereafter, on April 3, 2012, a Status Conference was held in this matter wherein a deadline of April 20, 2012, was established for Commission Staff to file a response to Halo's Partial Motion to Dismiss. In accordance with the deadline established at the Status Conference, Commission Staff submits this Memorandum in Opposition to the Partial Motion to Dismiss.

B. Law and Argument

In the Partial Motion to Dismiss, it is admitted that Halo entered into an interconnection agreement in Louisiana with AT&T. However, Halo denies that the basis of the AT&T Petition is an interpretation or enforcement of the terms of the interconnection agreement. (Halo Partial

Motion to Dismiss at 1). Halo alleges that, "AT&T is impermissibly and improperly seeking to have the Commission decide whether Halo is acting within and consistent with its federal license." (Halo Partial Motion to Dismiss at 1-2). Accordingly, Halo alleges that the Commission lacks jurisdiction over the subject matter of this litigation. Halo's position is wholly without merit and should not be sustained for the reasons discussed below.

While Halo filed a Partial Motion to Dismiss in this matter, their reasoning appears to constitute an Exception of Lack of Subject Matter Jurisdiction and an Exception of No Cause of Action under Louisiana law. Commission Staff addresses both of Halo's potential avenues of relief below.

1) Subject Matter Jurisdiction

Halo's argument that the Commission lacks jurisdiction to decide this matter rests upon Halo's interpretation that AT&T is seeking a clarification of Halo's commercial mobile radio service ("CMRS") license. Halo's contention that the Commission lacks jurisdiction is without merit for the reasons stated below.

The primary source of the Commission's jurisdiction is La. Const. Art. IV Sect. 21 which reads in pertinent part:

> The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

Consistent with this constitutional authority, the Commission has adopted the Regulations for Competition in the Local Telecommunications Market ("Local Competition Regulations"), as most recently amended by the General Order dated August 13, 2009. CMRS and CMRS providers are defined in Section 101 of the Local Competition Regulations, and subject to certain

regulations therein. For example, Section 401 (B) requires CMRS providers to file tariffs which identify and describe the rates and terms and conditions of services offered and provided in Louisiana. The tariff filings covered by Section 401 (B) are reviewed by Commission Staff when received.

Section 901 addresses the responsibility of a telecommunications service provider to the Commission when an interconnection agreement has been requested and negotiated. Section 901 (E) requires the negotiating parties to notify the Commission in writing of the date that a telecommunications service provider first requested interconnection. Section 901 (F) states, "In accordance with Section 252 (b) of the Telecommunications Act of 1996, either party to a negotiation may petition the Commission to arbitrate any open issue to the negotiation." Section 901 (G) requires ILECs and CLECs to file reports with the Commission regarding the volume of local terminating traffic. Several other subsections of section 901 address various responsibilities of telecommunications service providers to the Commission with respect to interconnection agreements. It is clear that the framework is well established for the Commission to review information filed by CMRS providers and to address issues related to the interconnection of telecommunication service providers.

Louisiana courts have consistently found that when the lack of subject matter jurisdiction is not apparent from the face of the petition, the burden of proving the lack of jurisdiction is on the party raising an exception. *Crocket v. Department of Public Safety and Corrections*, 97-2528 (La. App. 1st Cir 11/6/1998) 721 So.2d 1081, 1084; See Also *Miller v. Harper*, 99-316 (La. App. 3d Cir. 10/13/1999) 747 So.2d 642, 644; *Dupre Logistics, LLC v. Bridges*, 2010-1071 (La. App. 1st Cir. 12/22/2010) 2010 WL 5479723 at *2.

As stated in the preceding section, the Petition of AT&T includes four (4) counts containing allegations against Halo. In the Partial Motion to Dismiss, Halo moved to dismiss Counts I-III for the Commission's alleged lack of jurisdiction over the subject matter. Count I alleges that despite the requirement in the interconnection agreement that Halo is authorized only to send traffic that originates from wireless transmitting and receiving facilities to AT&T, Halo sends traffic to AT&T that is landline originated traffic. (See Petition, Paragraph 7).

Count II alleges that the interconnection agreement requires Halo to send AT&T proper call information to allow AT&T to bill Halo for the termination of Halo's traffic. (See Petition, Paragraph 10). Despite this requirement, AT&T claims that Halo has altered information that was presented to AT&T with the effect of obstructing AT&T from properly billing Halo for the subject traffic.

Lastly, Count III contains the allegation that the transmission of landline originating traffic to AT&T from Halo is prohibited by the interconnection agreement and therefore subject to tariffed switched access charges.

It is evident from a logical interpretation of the allegations on the face of the AT&T Petition that Counts I through III are seeking an interpretation and enforcement of the interconnection agreement entered into between Halo and AT&T.

Accordingly, all three (3) counts include the same subject matter, the interpretation and enforcement of provisions of the interconnection agreement. The United States Federal Court of Appeals has consistently held that state public utility commissions such as this Commission have the authority under the Telecommunications Act of 1996 to hear cases involving the interpretation and enforcement of interconnection agreements. See *Budget Prepay, Inc. v. AT&T*

Corp., 605 F.3d 273, 279 (5th Cir. 5/3/2010) citing *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas*, (5th Cir. 3/30/2000) 208 F.3d 475, 481-482.

In *Southwestern Bell*, the Fifth Circuit clearly stated, "...we hold that the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions." *Southwestern Bell*, 208 F.3d at 485. Thereafter, the Court announced that the determinations of public utilities commissions on the interpretation of interconnection agreements would be upheld unless they were arbitrary and capricious. *Id.*

In addition to the Fifth Circuit, this Commission has concluded that the FCC has authorized state commissions to construe interconnection agreements. *KMC Telecom Inc. v. Bellsouth Telecommunications, Inc.*, 1999 WL 1400188 (La. P.S.C. 10/28/1999).

Commission Staff reviewed the Petition filed by AT&T, including Counts I-III, and found that the subject matter of the Petition does not call into question any federal license issued to Halo to provide wireless service. Instead, the Petition is clear that the paramount issue is whether Halo is breaching the terms of the interconnection agreement it entered into with AT&T. Contrary to Halo's attempt to re-characterize the Petition, AT&T has not raised any issues regarding market entry or the rates of Halo as a CMRS carrier or called into question any federal license.

Halo also argues that jurisdiction is not present in this matter due to pending bankruptcy issues. This argument is premised upon the fact that Count III should be dismissed due to an automatic stay in Halo's bankruptcy proceedings. However, as stated in AT&T's Response to the Partial Motion to Dismiss, the bankruptcy court has held that the automatic stay does not apply to state commission proceedings such as the present matter. (See Exhibit "I" to AT&T Response to Partial Motion to Dismiss). This Commission has the authority to determine that Halo is liable

for damages in an unspecified amount under the holding in the bankruptcy proceeding. For this reason, Halo's argument regarding the automatic stay should be denied.

For the reasons stated above, specifically that well established federal and Commission precedent contradicts the arguments advanced by Halo, the Commission possesses subject matter jurisdiction in this matter. Accordingly, any arguments as to the lack of subject matter jurisdiction are without merit and the Partial Motion to Dismiss should be denied.

2) No Cause of Action

It appears from the arguments contained in the Partial Motion to Dismiss that Halo is alternatively seeking a dismissal based upon an argument akin to an Exception of No Cause of Action. By pursuing an Exception of No Cause of Action, Halo is asking this Tribunal to test the legal sufficiency of the Petition by determining whether the law affords a remedy on the facts alleged in the pleading. *Copeland v. Treasure Chest Casino, L.L.C.*, 01-1122 (La. 1st Cir. 6/21/2002) 822 So.2d 68; *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.* 616 So.2d 1234 (La. 1993).

La. C.C.P. art. 931 is clear that evidence may not be introduced to support or controvert the objection that the petition fails to state a cause of action, and all well-pleaded allegations of fact are accepted by the court as true. Therefore, the sole issue on an Exception of No Cause of Action is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Copeland*, 822 So.2d at 70; citing *Perere v. Louisiana Television Broadcasting Corporation,* 97-2873 (La.App. 1 Cir. 11/6/98), 721 So.2d 1075, 1077. Despite Halo's attempts to alter the nature of AT&T's allegations, Louisiana law is clear that this Tribunal should review the face of the Petition in determining whether the law affords a remedy on the facts alleged in the pleading.

Hall v. Zen-Noh Grain Corp., 01-0324 (La. 2001) 787 So.2d 280; See Also *Copeland, supra.* As such, Halo's factual arguments should not be considered in ruling on the Motion for Partial Dismissal.

Commission Staff incorporates by reference the details of Counts I-III as set forth above. It is clear from a plain reading of these allegations contained in the Petition that AT&T is asking this Tribunal to interpret and enforce the provisions of the interconnection agreement. Specifically, AT&T is asking the Commission to determine that Halo breached the provisions of their interconnection agreement and award the appropriate relief. Halo's federal license and any interpretation or enforcement of that license is irrelevant to the Partial Motion to Dismiss.

Additionally, as presented in AT&T's response to the Motion for Partial Dismissal, at least four (4) other state commissions have rejected similar arguments advanced by Halo.[1] Based upon Louisiana law which is clear that the allegations on the face of the Petition are to be accepted as true, and with due consideration afforded to other state commission which have denied similar arguments advanced by Halo, the Motion for Partial Dismissal should be denied.

C. Conclusion

Currently before this Tribunal is a Partial Motion to Dismiss filed by Halo. Halo argues that Counts I-III of the AT&T Petition should be dismissed. Halo's arguments take the form of an Exception of Subject Matter Jurisdiction and an Exception of No Cause of Action. Halo's Partial Motion to Dismiss is without merit as it contradicts well established Louisiana and federal law regarding the interpretation and enforcement of interconnection agreements. Halo's attempts to re-characterize the arguments of AT&T are not supported by the Petition itself and are

[1] Tennessee, Wisconsin, South Carolina, and Florida (See AT&T Response, Page 8).

insufficient to support the Partial Motion to Dismiss. For the reasons stated herein, the Motion for Partial Dismissal should be denied.

WHEREFORE, Louisiana Public Service Commission Staff, pray that this Tribunal deny the Partial Motion to Dismiss Counts I through III as filed by Halo Wireless, Inc., and enter an Order directing that this litigation shall not be dismissed.

Respectfully Submitted,

Brandon Frey (Bar Roll No. 25054)
Jeffrey Valliere (Bar Roll No. 31346)
Louisiana Public Service Commission
P.O. Box 91154
Baton Rouge, LA 70821-9154
602 N. Fifth Street, Galvez Bldg.,12th Floor (70802)
Ph. (225)342-3034
Fax (225)342-5610

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all parties of record by fax, email, or United States Mail, properly addressed and postage prepaid, on this 20th day of April, 2012.

JEFFREY VALLIERE

Service List for U-32237
as of 4/20/2012

Commissioner(s)

Lambert C. Boissiere, Commissioner
Eric Skrmetta, Commissioner
James "Jimmy" Field, Commissioner
Clyde C. Holloway, Commissioner
Foster L. Campbell, Commissioner

LPSC Staff Counsel

Brandon Frey, Deputy General Counsel

LPSC Staff

Jeffrey Valliere, LPSC Legal Division

Petitioner:

AT&T Louisiana
Michael D. Karno, Attorney
365 Canal Street
Suite 3060
New Orleans, LA 70130
Email: michael.karno@att.com; Telephone 1:(504)528-2003; Fax:(504)528-2948; Telephone 1:(504)528-2003;

Respondent:

Halo Wireless, Inc.
Steven H. Thomas
2501 N. Harwood, Suite 1800
Dallas, TX 75201

W. Scott McCullough
1250 S. Capital of Texas Hwy., Bldg 2-325
West Lake Hills, TX 78746

John Marks
2351 W. North Highway, Ste 1204
Dallas, TX 75220

Troy P. Majoue
2501 N. Harwood, Suite 1800
Dallas, TX 75201
Telephone 1:(214)954-6800; Fax:(214)954-6850;

Protestant:

Small Company Committee
Paul F. Guarisco
II City Plaza, 400 Convention Street, Suite 1100
Baton Rouge, LA 70821-4412
Email: paul.Guarisco@phelps.com; Fax:(225)381-9197; Telephone 1:(225)376-0241;

W. Bradley Kline
II City Plaza, 400 Convention Street
Suite 1100
Baton Rouge, LA 70802
Telephone 1:(0)-;