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Docket No. 34219

**In Re: Complaint of TDS TELECOM on Behalf of its Subsidiaries Blue Ridge Telephone & Telegraph Company, Inc., Nelson ball Ground Telephone Company, and Quincy Telephone Company Against Halo Wireless, Inc., Transcom Enhanced Services, Inc. and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and For Expedited Declaratory Relief and Authority to Cease Termination of Traffic**

**ORDER DENYING PARTIAL MOTION TO DISMISS**

On March 12, 2012, Halo Wireless Inc. filed a Partial Motion to Dismiss Counts I Through III; Notice of Filing of May 16, 2006 Order Confirming Plan of Reorganization of Transcom Enhanced Services and Motion to Dismiss; and Answer to the Complaint in Intervention of BellSouth Telecommunications, LLC d/b/a AT&T Georgia.

**I. Background**

On June 14, 2011, TDS TELECOM on behalf of its subsidiaries Blue Ridge Telephone Company, Camden Telephone & Telegraph Company, Inc., Nelson-Ball Ground Telephone Company, and Quincy Telephone Company (collectively "TDS Telecom") and, pursuant to O.C.G.A. §§ 46-2-20, 50-13-11, 46-5-45, 46-5-163(a), 9-4-1 *et. seq.* and Commission Utility Rule 515-2-1-.12, filed a Complaint against Halo Wireless, Inc. ("Halo Wireless"), Transcom Enhanced Services, Inc. ("Transcom"), and such other affiliated companies as are involved in the delivery of traffic to TDS Telecom for termination that have failed and refused to pay applicable access charges.

During the Commission proceeding, Halo filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Texas, Case No. 11-42646, on August 8. Upon receiving notice of Halo's bankruptcy filing, the Commission decided during the August 9 evidentiary hearing to stay the proceeding as to Halo, solely, and that no findings of fact would be binding upon it. Then, Defendants, including both Halo and

Transcom, sought removal of this Commission action to federal district court in the Northern District of Georgia, Atlanta Division, Case No. 1:11-CV-2749.<sup>1</sup>

On August 22, the district court stayed this action before the Commission pending final disposition of the Texas bankruptcy claim. On October 26, the Texas bankruptcy court found that the Commission could render a decision on the regulatory matters before it. Although the bankruptcy court directed that the Commission could determine whether it has jurisdiction raised in TDS Telecom's complaint, whether Halo violated Georgia law, and whether TDS Telecom was entitled to its requested relief, TDS Telecom could not collect on any liquidated debt incurred without the bankruptcy court's express permission. The bankruptcy court denied Halo's motion to further stay the proceedings pending its appeal to the Fifth Circuit. On January 26, 2012, the district court remanded this action back to the Commission.

The district court concluded that action before the Commission was not removable, citing similar rulings from three other district courts. The court determined that TDS Telecom's request to have the Commission issue cease and desist orders to prevent Defendants from acting in Georgia is clearly within the State's regulatory power. Further, as the court recognized, the Commission is expressly given jurisdiction to regulate telephone companies in Georgia. Finally, the district court found that because Halo removed this action prior to the Commission issuing an opinion, the court had no decision or interpretation to review. Consequently, the court granted TDS Telecom's motion to remand the action to the Commission.

## II. AT&T Complaint

On February 3, 2012, BellSouth Telecommunications, LLC d/b/a AT&T Georgia ("AT&T Georgia"), filed a complaint as Intervenor against Halo. In its Complaint, AT&T Georgia alleges that Halo violated the parties' wireless interconnection agreement ("ICA") by "sending large volumes of traffic to AT&T Georgia that does not originate on a wireless network," even though such action is not authorized by the ICA. (AT&T Complaint, p. 1) AT&T also alleges that Halo altered or deleted call detail information. *Id.* at 4-5. Furthermore, AT&T alleges that Halo has refused payment of access charges on non-wireless originated traffic. *Id.* at 5-6. Finally, AT&T alleges that Halo has not paid for transport facilities provided under the parties' ICA. *Id.* at 6.

AT&T requests the following relief:

- (a) Expedite the processing of this case;
- (b) Find that Halo has materially breached the ICA by (1) sending landline-originated traffic to AT&T, (2) inserting incorrect Charge Number information on calls, and (3) failing to pay for interconnection facilities;

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<sup>1</sup> After a determination that the Atlanta suit involved the same parties and issues, it was transferred to Gainesville. In its final order, the district court consolidated the cases and addressed them collectively in granting TDS Telecom's motion to remand.

- (c) Find that as a result of these breaches (or any one of them), AT&T Georgia is excused from further performance under the ICA and may stop accepting traffic from Halo;
- (d) Find that Halo is liable to AT&T for access charges on the interstate and interLATA landline traffic it has sent to AT&T;
- (e) Find that Halo is liable for the cost of interconnection facilities it has obtained from AT&T Georgia; and
- (f) Grant all other relief as is just and appropriate.

*Id.* at 6-7.

### **III. Halo Motion**

On March 12, 2012, Halo moved to dismiss Counts I through III of AT&T's complaint. In its Motion, Halo makes a preliminary statement that it has an FCC license to provide commercial mobile radio services. (Motion, pp. 1-2). Halo also states that it sells this service to Transcom Enhanced Services. *Id.* at 2. Courts of competent jurisdiction have previously ruled that Transcom is an enhanced service provider. *Id.* at 3. Halo asserts that a state commission cannot undertake to interpret or enforce federal licenses. *Id.* at 6. Halo's arguments with respect to the individual counts it seeks to dismiss are summarized as part of Staff's recommendation.

### **IV. Staff Recommendation**

Staff recommends that the Commission deny Halo's Partial Motion to Dismiss. The Georgia Court of Appeals has held that "[i]n ruling on a motion to dismiss, the trial court must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff." *Cunningham v. Gage*, 301 Ga. App. 306, 307 (2009). In order for Halo to prevail on its Partial Motion to Dismiss, the Commission must conclude that even if AT&T's allegations are true, AT&T would still not have stated a claim upon which relief could be granted.

AT&T's Complaint does not require the Commission to interpret or enforce any federal license. Instead, the complaint requests that the Commission interpret the parties' interconnection agreement that was approved by the Commission on August 10, 2010 in Docket No. 32226. The Commission has the authority to interpret the interconnection agreements that it approves. *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc. et al.* 317 F. 3d 1270 (2003).

Count I of AT&T's complaint alleges that Halo is breaching the parties' interconnection agreement by sending "traffic to AT&T Georgia that is not wireless-originated traffic, but rather is wireline-originated interstate, interLATA or intraLATA toll traffic." (AT&T Complaint, p. 4). Halo asks the Commission to dismiss the claim based on its contention that the traffic being sent

to AT&T originates from end user wireless equipment. (Halo Motion, p. 7). Halo argues that AT&T is barred from asserting that its customer, Transcom, is not an end user because AT&T was involved in litigation in bankruptcy court for the Northern District of Texas, and that court held that Transcom is an end user and that access charges do not apply to its traffic. *Id.* at 11.

With respect to Count I, Staff recommends that the Commission find that there are differences between the parties as to questions of fact. Further, if the allegations contained within AT&T's Complaint are presumed to be correct, then AT&T would prevail on this Count. Finally, Staff recommends that the Commission find that AT&T is not barred from asserting that Transcom is not an end user.

Three prerequisites must be met before *res judicata* will apply: (1) identity of the cause of action; (2) identity of the parties or their privies; and (3) previous adjudication on the merits by a court of competent jurisdiction.

*James v. Intown Ventures, LLC*, 2012 Ga. LEXIS 194 (2012) (citations omitted). As noted by the Tennessee Regulatory Authority, the Transcom bankruptcy proceeding did not involve the identical parties as the current case. *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.* Docket No. 11-00119, p. 6. In addition the TRA correctly noted that this case is a contract case and therefore not the same cause of action. *Id.* Collateral estoppel also requires that the identity of the parties be the same, and that requirement is not satisfied in this case. *See, Body of Christ Overcoming Church of God, Inc. v. Brinson*, 287 Ga. 485, 486 (2010). Moreover, the bankruptcy court orders do not resolve the issues AT&T raised in its complaint.

In Count II, AT&T alleges that Halo breached the parties' interconnection agreement by altering "call information it delivers to AT&T by inserting Charge Number ("CN") information when the call contains none, which has the effect of making toll calls appear to be local." (Complaint, p. 5). Halo's response is based on its contention that "this is end user telephone exchange service originating traffic and the service being provided is functionally equivalent to an integrated services digital network ("ISDN") primary rate interface ("PRI") . . . trunk to a large communications intensive business customer." (Halo Motion, pp. 11-12). However, this response involves an apparent factual dispute with the allegations raised in AT&T's complaint that are relevant to the resolution of this issue. Again, if the allegations contained in AT&T's complaint are presumed to be true, then AT&T would prevail on this issue. Therefore, dismissal is not proper for Count II.

In Count III, AT&T alleges that the traffic Halo is sending it is subject to access charges. (Complaint pp. 5-6). Halo argues that Count III should be dismissed because the Bankruptcy Stay prohibits consideration of any order to pay access charges and the traffic in question is not subject to access charges. (Halo Motion, p. 16). The Bankruptcy Court Order provides that regulatory proceedings cannot involve "liquidation of the amount of any claim against the Debtor, or any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor." AT&T's Complaint did not request that the Commission liquidate

the amount of the claim against the Debtor; therefore, it does not violate the bankruptcy stay. For these reasons, Staff recommends that the Commission deny the Partial Motion to Dismiss with respect to Count III.

**V. Commission Decision**

For the reasons stated therein, the Commission adopts Staff's recommendation to deny Halo's Partial Motion to Dismiss.

**VI. Ordering Paragraphs**

**WHEREFORE, it is**

**ORDERED**, Halo's Partial Motion to Dismiss is hereby denied.

**ORDERED FURTHER**, that this Order shall remain in full force and effect until further Order of the Commission.

**ORDERED FURTHER**, that a motion for reconsideration, rehearing, oral argument, or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

**ORDERED FURTHER**, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order(s) as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 17<sup>th</sup> day of April, 2012.



Reece McAlister  
Executive Secretary

5-8-12  
\_\_\_\_\_  
DATE



Tim G. Echols  
Chairman

5-9-12  
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DATE