BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition for relief against Halo Wireless, Inc. for breaching the terms of the wireless interconnection agreement, by BellSouth Telecommunications, LLC d/b/a AT&T Florida	)	**DOCKET NO. 110234-TP**

REBUTTAL TESTIMONY OF J. SCOTT MCPHEE ON BEHALF OF AT&T FLORIDA

MAY 25, 2012

COM 5
APA
ECR
GCL 8
RAD 1
SRC
ADM
OPC
CLK
GRep 1

I. INTRODUCTION

Q. PLEASE STATE YOUR NAME.

A. My name is J. Scott McPhee.

Q. ARE YOU THE SAME SCOTT MCPHEE WHO SUBMITTED DIRECT TESTIMONY IN THIS CASE ON APRIL 27, 2012?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. I will respond to certain assertions made by Halo witnesses Russ Wiseman and Robert Johnson that relate to matters I discussed in my direct testimony.

II. HALO'S DELIVERY OF LANDLINE TRAFFIC IN BREACH OF ICA.

Q. YOU SHOWED IN YOUR DIRECT TESTIMONY THAT THE HALO-AT&T FLORIDA INTERCONNECTION AGREEMENT ("ICA") REQUIRES HALO TO SEND ONLY WIRELESS-ORIGINATED TRAFFIC TO AT&T FLORIDA. DOES HALO DISAGREE WITH THAT?

A. No.

Q. DOES HALO IDENTIFY ANY ACTIONS IT HAS TAKEN TO MAKE SURE IT DOES NOT SEND LANDLINE-ORIGINATED TRAFFIC TO AT&T FLORIDA?

A. No. On the contrary, Mr. Wiseman states that "Halo is not in a position to determine where or on what network the call[s] started, and we have not asked our customer [*i.e.* Transcom]."[1]

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[1] Pre-Filed Testimony of Russ Wiseman on Behalf of Halo Wireless, Inc. ("Wiseman Testimony"), at 33, lines 19-21.

Q. DOES HALO DENY THAT IT HAS BEEN SENDING TRAFFIC TO AT&T FLORIDA THAT BEGINS ON LANDLINE EQUIPMENT?

A. No. Mr. Wiseman admits that most calls Halo sends to AT&T Florida probably started on other networks and that it "would not surprise me if some of them started on the PSTN" (Public Switched Telephone Network).[2] I read that as Mr. Wiseman's understated way of admitting that Halo is, in fact, sending AT&T Florida traffic that comes from the PSTN.

Q. GIVEN THESE ADMISSIONS, HOW CAN HALO CLAIM IT HAS NOT BREACHED THE ICA?

A. I don't think it can. Halo argues, however, that even when calls begin as landline calls, they somehow "originate" again as wireless calls when they pass through Transcom before reaching Halo. More specifically, Halo contends that Transcom is an "Enhanced Service Provider," or "ESP," that ESPs are treated as "end users," and that ESPs are deemed to originate (or re-originate) calls that pass through them. That argument fails, however, for reasons that Mark Neinast and I have discussed in our testimony, some of which I return to below, and that AT&T Florida will set forth in full in its legal briefs.

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[2] *Id.* at 33, lines 15-16.

Q. MR. WISEMAN SUGGESTS THAT EVEN IF THE COMMISSION CONCLUDES THAT HALO IS WRONG, THE COMMISSION SHOULD NOT CONDEMN OR PENALIZE HALO FOR MAKING A BUSINESS PLAN THAT HALO BELIEVED WAS LAWFUL AT THE TIME.[3] HOW DO YOU RESPOND?

A. AT&T Florida has not asserted a fraud claim against Halo, and is not asking the Commission to penalize Halo, or to decide with what state of mind Halo breached its ICA. AT&T Florida's only claim in this case is that Halo has, in fact, breached the ICA and that Halo is liable to AT&T Florida, pursuant to AT&T Florida's tariffs, for the access traffic that Halo has delivered to AT&T Florida, and, pursuant to the ICA, for facilities that Halo obtained from AT&T Florida and did not pay for. As a remedy, AT&T is asking the Commission to authorize AT&T Florida to discontinue service to Halo under the ICA and to find that Halo is liable for access charges on the access traffic it has delivered and for facilities charges, with the amounts to be determined later, probably by the bankruptcy court. These are not penalties; they are the normal consequences of a material breach of contract such as Halo's.

Q. IN LIGHT OF HALO'S TESTIMONY, DO THE PARTIES STILL DISAGREE ABOUT WHETHER TRANSCOM IS AN ESP?

A. Yes. Given the fact that Halo is indisputably sending AT&T Florida traffic that originated on landline equipment, Halo's only defense is that (1) Transcom is an ESP, and (2) because Transcom is an ESP, all traffic that passes through Transcom actually terminates on Transcom's equipment, which then initiates a further communication – the communication that Halo delivers to AT&T. AT&T continues to maintain that

[3] *Id.* at 42, lines 6-8; 50, lines 12-14.

Transcom is not an ESP, and that even if it is, that does not mean it terminates and originates calls, as Halo contends.

Q. HAVE YOU YOURSELF TESTIFIED THAT TRANSCOM IS NOT AN ESP?

A. Only in a very limited way. To the extent that the question whether Transcom is an ESP is a legal question, AT&T will address it primarily in its legal briefs, though Mr. Neinast touches on that subject. To the extent that the question is factual, Mr. Neinast and AT&T Illinois witness Ray Drause have discussed the pertinent facts. In my direct testimony, I discussed the FCC's Order in *Connect America Fund*, which rejected Halo's theory that calls that originate on landline equipment somehow become wireless calls when they pass through Halo.

In addition, I pointed out that Transcom has billed itself as a provider of voice termination services, which is very different than, and inconsistent with, Halo's litigation position that Transcom is an ESP. Specifically, Transcom's website proclaimed:

> **Voice Termination Service**
> *This is our core service offering*. Transcom provides termination services throughout the world with a focus on North America.[4]

Obviously, the statement that voice termination service is Transcom's core service offering is not consistent with Halo's litigation position that Transcom is an enhanced service provider. In addition, that statement appeared on a Transcom webpage entitled "Products and Services," which made no mention of "enhancements" or audio quality. It is striking, to say the least, that Transcom claims to be an ESP based

[4] *See* Exhibit JSM-3 (Transcom web pages) (second emphasis added).

on purported enhancements to audio quality, but that Transcom's own marketing description of its Products and Services did not mention enhancements or audio quality.

This absence of any mention of enhancements in Transcom's marketing description of its Products and Services is consistent with something we learned in the parallel Halo proceedings before the Wisconsin Public Service Commission: None of Transcom's marketing materials (not just its website) and none of Transcom's contracts with its customers made any mention of the supposed "enhancements" that Halo touts in this case. I do not believe enhancements can be an important part of what Transcom is selling its customers when Transcom's marketing materials do not mention the enhancements and, more important, when Transcom's contracts with its customers do not require Transcom to provide enhancements.

As I noted in my direct testimony, Halo changed its website after AT&T pointed out in proceedings like this one that Transcom's depiction of itself on the website was inconsistent with its position in these proceedings, but Halo cannot undo the effect of its admissions by erasing them.

Q. BUT HALO WITNESS JOHNSON INSISTS THAT TRANSCOM CHANGED ITS WEBSITE ONLY BECAUSE THE WEBSITE WAS DOING A POOR MARKETING JOB, NOT BECAUSE THE ADMISSIONS ON THE WEBSITE WERE HURTING HALO/TRANSCOM IN THESE PROCEEDINGS.[5]

A. I'm confident the Commission can decide which is the more plausible explanation. There is Halo's explanation, which is essentially that Transcom unthinkingly and

[5] Pre-filed Testimony of Robert Johnson on Behalf of Halo Wireless, Inc. ("Johnson Testimony") at 25, lines 10-15.

mistakenly said on its website that its core service offering was voice termination services, and foolishly forgot to make any mention of enhanced services, even though enhanced services is really its core service offering, and then – after AT&T pointed out the disconnect between what Transcom was saying on its website and what Transcom is saying in litigation – corrected the errors for reasons that had nothing to do with the litigation. The other possibility is that voice termination services is indeed Transcom's core service offering, as its website said, and that the purpose of the so-called enhancements (which Transcom's customers care about little, if at all, and don't even insist be mentioned in their contracts) is to facilitate an argument for not paying access charges – and that Transcom changed the website because Halo and Transcom recognized that they had shot their litigation position in the foot.

Q. IN YOUR DIRECT TESTIMONY, YOU STATED THAT "THE FCC REJECTED HALO'S ARGUMENT ABOUT WHERE HALO'S CALLS ORIGINATE IN ITS NOVEMBER, 2011 *CONNECT AMERICA ORDER*."[6] YOU THEN SAID, BASED ON YOUR PARTICIPATION IN PARALLEL CASES WITH HALO IN OTHER STATES, THAT IT APPEARS THAT HALO, AFTER SOME INITIAL RESISTANCE, NOW ACKNOWLEDGES THAT THE FCC DID INDEED REJECT ITS POSITION.[7] DOES HALO'S TESTIMONY IN THIS CASE CONFIRM THAT?

A. Yes. Mr. Wiseman states, "We acknowledge that the FCC . . . apparently now believes ESPs . . . do not originate calls."[8] When he says this, Mr. Wiseman is admitting that the FCC has rejected Halo's theory, because the only basis for Halo's

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6 Direct Testimony of J. Scott McPhee ("McPhee Direct"), at 15, lines 9-10.

7 *Id.* at 17, line 1 - 18, line 4.

8 Wiseman Testimony at 53, lines 9-11.

theory that Transcom originates the calls that Halo delivers to AT&T was Halo's contention that Transcom is an ESP.

Q. MR. WISEMAN CONTENDS, HOWEVER, THAT THE FCC'S VIEW THAT ESPS DO NOT ORIGINATE CALLS IS A DEPARTURE FROM PRIOR PRECEDENT, DOESN'T HE?

A. Yes, he says that the FCC's holding that ESPs do not originate calls is a "reversal of course from prior precedent."[9]

Q. DOES AT&T AGREE?

A. No. Nothing in the FCC's discussion of Halo (which I quoted at pages 15-16 of my direct testimony) suggests the FCC thought it was departing from prior precedent. To the contrary, it is clear that the FCC was applying its existing rules to Halo's activity. The FCC's discussion of Halo comes immediately after paragraph 1004, which reads:

> The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order ***maintain***, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, ***parties must continue to rely on the intraMTA rule*** to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity ***to remove any ambiguity regarding the interpretation of the intraMTA rule***. (Emphasis added.)

It seems clear to me that the FCC was not creating some new rule that would apply only on a going-forward basis. Instead, the FCC expressly stated that it was "removing any ambiguity" regarding the ***existing*** intraMTA rule that "parties must ***continue*** to rely on" during the transition period.

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[9] *Id.*

The FCC then discussed Halo in the next two paragraphs of its Order (paragraphs 1005 and 1006). In that discussion, the FCC stated, "We ***clarify*** that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider."[10] I read a good many FCC orders, and it is my understanding that when the FCC says it is "clarifying" a point, that means it is making clear a point that was already true – not that it is departing from prior precedent. And it was in that same *clarifying* paragraph that the FCC said, "the 're-origination' of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation, and we disagree with Halo's contrary position." Plainly, the FCC did not think it was departing from prior precedent.

Q. IS THERE ANOTHER REASON THAT AT&T FLORIDA BELIEVES THE FCC'S REJECTION OF HALO'S POSITION WAS NOT A DEPARTURE FROM PRIOR PRECEDENT?

A. Yes. The question whether an ESP is a call originator is a legal question that AT&T will address in its briefs. To give the Commission a general idea of AT&T's position, however, I am informed by counsel that the FCC has *never* held that an ESP "originates" calls that started elsewhere and end elsewhere and merely pass through the ESP somewhere in the middle. I am further informed by counsel that AT&T Florida will show in its briefs that:

- ESPs are treated as end-users *only for the purpose of applying access charges*, and treated as end users *only for purposes of the FCC's access charge rules*.

[10] *Connect America Fund* ¶ 1006 (emphasis added).

- An ESP cannot use this limited "end-user" status to claim it "originates" calls that actually began when someone else picked up a phone and dialed a number.

- The ESP exemption from access charges applies only to the ESP itself, not to any telecommunications carrier that serves the ESP. Thus, even if Transcom were an ESP, Halo cannot claim the benefit of the exemption.

Q. MR. WISEMAN STATES: "WHILE WE ACKNOWLEDGE THAT THEY [THE FCC] HELD THAT THIS TRAFFIC DOES NOT ORIGINATE ON HALO'S NETWORK 'FOR PURPOSES OF THE INTRAMTA RULE,' THAT DOES NOT MEAN IT DOES NOT 'ORIGINATE' FROM TRANSCOM FOR OTHER PURPOSES, INCLUDING THE PROVISION IN THE ICA IN ISSUE IN THIS CASE."[11] IS THAT A PERSUASIVE POINT?

A. No. That is one of those statements that at first blush may sound like it makes some sense, but that does not hold up if you give it even a little thought. As I noted above, and as AT&T Florida will further explain in its legal briefs, the FCC's exemption of ESPs from access charges is just that – a rule that says ESPs, instead of paying interstate access charges, are treated as end users for purposes of the FCC's access charge regime, and thus do not pay access charges. The *only* sense in which the rule treats ESPs as end users is by exempting them from access charges; the rule does not deem ESPs originators of all traffic that passes through them. Thus, when the FCC rejected Halo's contention that Transcom's presence in the middle of the call meant that the call originated with Transcom for purposes of the intraMTA rule (that is, for purposes of intercarrier compensation), the FCC was rejecting *in its entirety*, and for all purposes, Halo's view of Transcom as a call originator.

[11] Wiseman Testimony at 35, lines 15-18. Mr. Johnson makes the same point in his testimony, at p. 6, lines 5-7. He introduces the point, however, by saying that AT&T Florida "claim[s], incorrectly, that the FCC has declared Transcom's traffic to be 'landline' traffic and therefore not wirelessly-originated . . . ." That simply is not so. AT&T Florida merely pointed out that the FCC disagreed with Halo's position and stated that landline traffic did not convert to wireless traffic because it traveled over a wireless link in the middle.

Q. MR. WISEMAN ALSO SUGGESTS THAT THE FCC ACTUALLY DEEMED THE TRAFFIC THAT HALO PASSES ON TO ILECS TO BE NON-ACCESS TRAFFIC.[12] DO YOU AGREE?

A. No. It is absolutely clear that in paragraphs 1005 and 1006 of the *Connect America Fund* Order, which I quoted in my direct testimony, the FCC was saying that the traffic that Halo was claiming was non-access traffic was in reality access traffic. Indeed, that is the very point the FCC was making. Mr. Wiseman's theory is based on the premise that when the FCC used the term "transiting" in paragraph 1006, it was using it in the same sense as when it later defined transit service, in an entirely separate part of the Order discussing an entirely different issue, as involving "non-access traffic." Based on this, he suggests that Halo's traffic cannot be subject to access charges. Given how clear it is that the FCC was saying in paragraphs 1005 and 1006 that the traffic at issue was access traffic, Halo's suggestion that the FCC meant exactly the opposite based on something the FCC said in an entirely different part of the Order is absurd. Moreover, the primary issue in this case is whether the traffic Halo has been sending to AT&T Florida is landline-originated, and Halo's argument about the term "transiting" has nothing to do with that point.

Q. MR. WISEMAN SAYS HE EXPECTS THE COURT OF APPEALS FOR THE TENTH CIRCUIT WILL REVERSE THE FCC'S *CONNECT AMERICA FUND* ORDER.[13] HOW DO YOU RESPOND?

A. Needless to say, this Commission should apply the law as it exists today and decline Halo's invitation to speculate about what may or may not happen in a challenge to the

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[12] Wiseman Testimony at 34, lines 1-9.

[13] Wiseman Testimony at 36, lines 6-7.

FCC's decision. This is particularly appropriate given that in the past, Halo has asserted with great conviction that the FCC would see things Halo's way and that state commissions should not hear AT&T's complaints against it. As the Commission is aware from AT&T Florida's previous submissions in this docket, the FCC did not see things Halo's way, and federal courts across the nation have held that state commissions should hear these complaints.

Q. MR. WISEMAN TESTIFIES THAT THE ICA HAS A "CHANGE OF LAW PROVISION," AND THAT HALO INTENDS TO INVOKE IT.[14] BEFORE YOU ADDRESS HALO'S INTENT TO INVOKE CHANGE OF LAW, PLEASE EXPLAIN THE CHANGE OF LAW PROVISION TO WHICH MR. WISEMAN REFERS.

A. Most provisions in virtually any interconnection agreement reflect the law as it existed at the time when the ICA was entered – particularly including the requirements in section 251 of the Telecommunications Act of 1996 (interconnection, unbundled elements, resale, collocation, etc.), the FCC's Rules implementing those requirements, and FCC and State Commission orders applying those requirements. Not all ICA provisions reflect the law, because parties are free to depart from the requirements of the 1996 Act when they negotiate an ICA, but most provisions do, either because the parties agree on language that reflects current law or because the parties fail to agree and arbitrate language, in which event the state commission must impose language that reflects current law.

The law changes, however – not the 1996 Act itself, but the FCC's implementing Rules and FCC and state commission interpretations of the law. Recognizing that

[14] *Id.* at 72, lines 9-14.

fact, interconnection agreements typically include "change of law" provisions that allow for language in the ICA to be changed if the law on which that language was based changes during the term of the ICA. The change of law provision in the Halo/AT&T Florida ICA appears in Section XVII.E, which reads:

> In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Carrier or BellSouth to perform any material terms of this Agreement, Carrier or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section XX.[15]

Q. HOW DO YOU RESPOND TO MR. WISEMAN'S STATEMENT THAT HALO INTENDS TO INVOKE THE CHANGE OF LAW PROVISION IN LIGHT OF THE *CONNECT AMERICA FUND* ORDER?

A. If Halo wants to change the parties' ICA, that can only mean that Halo is not happy with what the ICA says now – carriers do not invoke change of law just because the law changes; they do so only when they do not like the provisions in their existing ICA. It is understandable that Halo does not like its ICA with AT&T Florida, because Halo, while purporting to carry out its business plan, is methodically breaching that ICA.

If Halo does ask to amend the ICA pursuant to the change of law provision, AT&T will respond as appropriate. That said, the *Connect America Fund* Order did not change the law that led the FCC to reject Halo's argument concerning the origination of traffic that passes through Transcom. The FCC did not create a new rule in that regard, but instead clarified the same rule that has been in effect since the parties

[15] The ICA is Exhibit JSM-4 to my direct testimony.

entered into the ICA. Beyond that, the FCC's clarification makes clear that Halo's position in this proceeding is, and always has been, wrong.

The important point for present purposes, though, is that this case must be decided under the existing contract language – language that Halo admits is unfavorable to Halo when it states it will seek to amend the ICA.

Q. MR. WISEMAN ALSO SAYS "WE ARE PREPARED TO OPERATE UNDER THE FCC'S NEW REGIME . . . BUT WE MUST BE GIVEN A CHANCE TO BRING OUR ARRANGEMENTS AND OPERATIONS INTO COMPLIANCE, AND THE FULL SET OF FCC RULES MUST BE IMPLEMENTED."[16] WHAT IS YOUR REACTION TO THAT?

A. As I have said, AT&T does not think there is anything new about the legal principles that mean that Halo has breached the ICA. And as I understand it, it is for the bankruptcy court to decide if Halo can come up with a workable business plan. In any event, for purposes of this case Halo's plea seems to me to be just the latest in a very long – and unsuccessful – line of stall tactics. Halo has made many futile attempts to deter this Commission, and other state commissions, from deciding AT&T's claims,[17] and Mr. Wiseman's appeal for time to bring its operations into compliance with the law sounds like yet another variation on the same theme. This proceeding does not present the question whether Halo can devise a viable business plan any more than it presents the question whether Halo is entitled to a change in the terms of its ICA. AT&T Florida respectfully urges the Commission to decide the questions that are presented in this proceeding as promptly as practicable.

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[16] Wiseman Testimony at 31, lines 6-9.

[17] Some of those attempts, including removals to federal court, motions to stay and frivolous motions to dismiss, are described in AT&T Florida's Response to Halo's Partial Motion to Dismiss, filed January 17, 2012, at 2-3.

Q. HALO/TRANSCOM RELY ON RULINGS BY A BANKRUPTCY COURT FINDING TRANSCOM AN ESP IN 2005-2007, AND MR. JOHNSON SAYS THAT AT&T'S WITNESSES "ARGUE, ILLOGICALLY, THAT THIS COMMISSION SHOULD IGNORE FEDERAL COURT RULINGS THAT TRANSCOM IS AN ESP IN FAVOR OF THE TENNESSEE REGULATORY AUTHORITY ('TRA') RULING THAT IS NOT [SIC] SIMPLY BECAUSE THE TRA RULING IS NEWER, INSTEAD OF HOLDING THE FEDERAL RULINGS IN THE SAME OR HIGHER DIGNITY."[18] HOW DO YOU RESPOND?

A. That is really a subject for the legal briefs, but I will note that AT&T Florida has not suggested that the Commission should "ignore" the bankruptcy rulings (which Halo calls the "ESP Rulings"). There are powerful reasons for giving more weight to the TRA's decision than to the ESP Rulings, however, not the least of which is that Halo made the same arguments about the ESP Rulings to the TRA that it is making here, and the TRA was not persuaded. The point is *not*, as Mr. Wiseman puts it, that the TRA decision is "newer"; it is that the TRA considered, and rejected, the bankruptcy court finding. The TRA gave detailed and cogent reasons for its determination that Transcom is not an ESP,[19] and its decision was in accord with the decision of the only other state commission that has ruled on the question whether Transcom is an ESP, the Pennsylvania Public Utility Commission ("PPUC").[20]

The TRA's decision is also more pertinent here than the so-called ESP Rulings because it is, so far, the only decision by any state commission on the precise issue presented here: whether Halo is breaching its ICA with AT&T by delivering landline-

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[18] Johnson Testimony at 6, lines 8-11.

[19] *See* Direct Testimony of Mark Neinast on Behalf of AT&T Florida ("Neinast Direct") at 25, line 15 - 27, line 4.

[20] *Id.* at 27, lines 5-17.

originated traffic to AT&T. None of the ESP Rulings held that Transcom was an end user, or that calls terminate with or originate with Transcom.

The ESP Rulings carry little precedential weight for other reasons as well. The earliest ESP Ruling on which Halo relies was vacated on appeal, and vacated rulings have no preclusive effect. *E.g.*, *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) (collecting cases). And the ESP Ruling that confirmed Transcom's plan of reorganization did not resolve any dispute between parties regarding whether Transcom was an ESP – much less whether all calls that pass through Transcom must be deemed to be wireless-originated – because that point was neither contested in that proceeding nor necessary to the order. Perhaps most important, none of the ESP Rulings says that Transcom somehow originates or re-originates, and changes to wireless, every call that passes through it, for none of the decisions even addresses that issue. Accordingly, the ESP Rulings have little bearing on the matters that are at issue here. If any decision is controlling in this case, it is the FCC's rejection in *Connect America Fund* of precisely the position that Halo asserts here.

Finally, the determinations by the Tennessee and Pennsylvania commissions that Transcom is not an ESP also carry more weight than the bankruptcy court finding because state utility commissions are more knowledgeable about these matters than bankruptcy courts are. To be sure, some aspects of this case may be unusual for this Commission, and others, but the basic subject matters – call origination, intercarrier compensation, and even access charge avoidance schemes – are very familiar. For most bankruptcy courts, however, even the most basic telecommunications concepts are Greek.

Q. MR. JOHNSON NOTES THAT YOU USE THE WORD "INITIATES" RATHER THAN "ORIGINATES," AND ASSERTS THAT BY DOING SO, YOU ARE "IMPLICITLY ACKNOWLEDGING THAT TRANSCOM MUST 'ORIGINATE' TRAFFIC TO HALO, EVEN IF ANOTHER PARTY 'INITIATED' THIS TRAFFIC ON SOME NETWORK AND IT IS THEN HANDLED BY TRANSCOM."[21] IS THAT CORRECT?

A. No. The only time I chose to use the word "initiate" in my testimony was when I said this:

> To the best of my knowledge, and based on everything Halo has said in other state proceedings, neither Transcom nor any customer of Transcom actually initiates any telephone calls. Rather, Transcom takes calls initiated by customers of other carriers and then hands the calls off to someone else (here, Halo) *before* the calls are delivered to the carrier that actually terminates the call to an end user.[22]

When I said that, I was not acknowledging anything. I used the word "initiates" because I was trying to make a very simple factual point – no calls start with Transcom or with any Transcom customer – and I wanted to avoid the possible complications I might cause by using the word "originates," which is so controversial in this case.

Q. MR. WISEMAN EMPHASIZES THAT SOME OF THE TRAFFIC HALO DELIVERS TO AT&T FLORIDA IS VOIP TRAFFIC.[23] TAKING THAT AS TRUE FOR THE SAKE OF DISCUSSION, WHY IS IT SIGNIFICANT?

A. It is not at all significant, at least for purposes of AT&T Florida's claims against Halo in this docket. Mr. Wiseman's point is that VoIP traffic that is allegedly "originated" or "re-originated" by Transcom and delivered after December 29, 2011, is not subject

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[21] Johnson Testimony at 27, lines 14-19.

[22] McPhee Direct at 9, line 16 - 10, line 1. I also used the word in a quote of the FCC.

[23] Wiseman Testimony at 42, line 13 - 45, line 2.

to access charges. But the only thing that point could possibly bear on is the determination of how much money Halo owes AT&T Florida in unpaid access charges, and AT&T Florida has been very clear it is not asking the Commission to make that determination in this case.

III. FAILURE TO PAY FOR INTERCONNECTION FACILITIES

Q. ON PAGES 72-82 OF HIS TESTIMONY, MR. WISEMAN DISCUSSES THE FACILITIES CHARGES THAT AT&T CLAIMS HALO OWES. BASED ON YOUR REVIEW OF MR. WISEMAN'S TESTIMONY, WHAT IS HALO'S POSITION?

A. Halo maintains that each carrier is entirely responsible for all facilities on its side of the Point of Interconnection ("POI") where the parties' networks meet for the exchange of traffic. Mr. Wiseman repeatedly asserts that the POI is the point of demarcation that separates the interconnection facilities for which Halo is financially responsible from the interconnection facilities for which AT&T Florida is financially responsible.

Q. IS MR. WISEMAN CORRECT?

A. As applied here, no. As I explained in my direct testimony, there are situations – specifically relating to interconnection between two *landline carriers* – where the POI does indeed serve as a financial demarc, so that each carrier is solely responsible for all of the facilities on its side of the POI.[24] However, as I also explained, that is not the case when the interconnection is with a wireless carrier,[25] which Halo claims

[24] McPhee Direct at 25, lines 16-26.

[25] *Id.* at 24, line 14 - 25, line 15.

to be and, more important for present purposes, claimed to be when it entered into its ICA with AT&T Florida. Halo's ICA is a wireless ICA, and it provides that the cost of the entire facility is to be shared between Halo and AT&T Florida based upon each carrier's proportional usage.

Q. IS "POINT OF INTERCONNECTION" A DEFINED TERM IN THE ICA?

A. Yes. Section I.I provides:

> **Point of Interconnection (POI)** is defined as the physical geographic location(s), within BellSouth's service area within a LATA, at which the Parties interconnect their facilities for the origination and/or termination of traffic. ***This point establishes the technical interface, the test point(s), and the point(s) for operational division of responsibility between BellSouth's network and Carrier's network.*** (Emphasis added.)

This definition clearly defines what a POI is for purposes of the ICA between Halo and AT&T Florida pursuant to which AT&T provided the facilities at issue here.

Q. DOES THE DEFINITION OF "POI" IN THE ICA INDICATE THAT THE POI IS THE POINT OF DEMARCATION FOR FINANCIAL RESPONSIBILITY FOR INTERCONNECTION FACILITIES, AS MR. WISEMAN CONTENDS IT IS?

A. No, it does not. The definition clearly states that the point of interconnection establishes only "the technical interface, the test point(s), and the point(s) for operational division of responsibility between" the Parties.[26] It does not indicate in any way that the point of interconnection also serves to allocate financial responsibility for interconnection facilities, as Halo contends it does. If that were the

[26] Operational responsibilities include the provisioning of the facilities, as well as any maintenance in order to ensure continued operation.

intent, the definition would say so –and it certainly would not expressly define the other functions of the POI while omitting the financial demarcation function.[27]

Q. SO WHERE DOES THE ICA ASSIGN "FINANCIAL RESPONSIBILITY" FOR THE INTERCONNECTION FACILITIES BETWEEN HALO AND AT&T FLORIDA?

A. First, facilities costs aren't "assigned" to a specific party as Halo believes (by using the POI as an assignment demarcation, for example); instead, per the terms of the ICA, *the costs of the entire facility between Halo and AT&T Florida* are shared based upon each carrier's proportional use. Under ICA Section VI, "Compensation and Billing," "Compensation of Facilities" is addressed in subsection B. Section VI.B.2 specifically addresses two-way interconnection facilities, which are currently in place between Halo and AT&T Florida:

> 2. The Parties agree to share proportionately in the recurring costs of two-way interconnection facilities.
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> a. To determine the amount of compensation due to Carrier for interconnection facilities with two-way trunking for the transport of Local Traffic originating on BellSouth's network and termination on Carrier's network, Carrier will utilize the prior months undisputed Local Traffic usage billed by BellSouth and Carrier to develop the percent of BellSouth originated Local Traffic.
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> b. BellSouth will be Carrier for the entire cost of the facility. Carrier will then apply the BellSouth originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by BellSouth to Carrier. Carrier will invoice BellSouth on a monthly basis, this proportionate cost for the facilities utilized by BellSouth.

As I explained in my direct testimony, under this ICA, the costs for wireless facilities are apportioned based upon the percentage of total traffic for which each carrier is

[27] My lawyer tells me there is a Latin phrase for this concept: "Expressio unius est exclusio alterius," *i.e.*, to express the inclusion of one thing is to imply the exclusion of others. *E.g.*, *Osborne v. Dumoulin*, 55 So. 3d 577, 587 (Fla. 2011).

responsible. AT&T Florida is responsible for the portion of traffic that originates with AT&T Florida end users and is destined for Halo. Halo, on the other hand, is responsible for the portion of traffic Halo sends to AT&T Florida for termination to AT&T Florida end users. Halo is also responsible for any intermediary (transit) traffic exchanged between itself and third party carriers that is transported via these facilities.

Q. IF AT&T FLORIDA END USERS WERE MAKING CALLS TO HALO END USERS OVER THE PARTIES' INTERCONNECTION, WOULD HALO BE ENTITLED TO COMPENSATION FROM AT&T FLORIDA FOR A PORTION OF THE INTERCONNECTION FACILITIES HALO HAS PROVISIONED?

A. Yes. For example, imagine that Halo were responsible for 80% of the traffic and AT&T Florida were responsible for 20% of the traffic, based upon relative volumes of traffic exchanged between the parties. Halo would then be entitled to compensation from AT&T Florida for 20% of the cost of interconnection facilities that Halo provisioned, and AT&T would be entitled to compensation from Halo for 80% of the cost of the interconnection facilities that AT&T Florida provisioned. In this way, the entire interconnection facility is shared proportionally between the Parties, based upon their respective percentages of traffic.

Q. BASED ON THE TRAFFIC HALO AND AT&T FLORIDA ARE ACTUALLY EXCHANGING, FOR WHAT PERCENTAGE OF THE TOTAL INTERCONNECTION FACILITY IS HALO RESPONSIBLE?

A. Halo is responsible for 100% (or very close to 100%) of the traffic. That is simply because AT&T Florida originates no (or very little) traffic destined to Halo.[28] Therefore, the shared cost of the facility is assigned 100% to Halo; AT&T Florida owes Halo no compensation for the facilities Halo has provisioned; and Halo owes AT&T Florida 100% of the cost of the facilities AT&T Florida has provisioned.

Q. DOES IT SURPRISE YOU THAT AT&T ORIGINATES VIRTUALLY NO TRAFFIC DESTINED TO HALO?

A. No, because as I noted in my direct testimony, Halo has virtually no end user customers in Florida.[29] In other words, there simply are no Halo customers in Florida for anyone to call, so it is not surprising that AT&T Florida originates next-to-no traffic destined to Halo.

Q. MR. WISEMAN CONTENDS THAT SOME OF THE CHARGES AT ISSUE ARE NOT "FACILITIES" CHARGES BUT INSTEAD RELATE TO "TRUNKS" AND "TRUNK GROUPS."[30] DOES THE ICA ADDRESS HOW ALL OF THESE DISPUTED CHARGES – WHETHER "FACILITIES," "TRUNKS" OR "TRUNK GROUPS" – ARE TO BE COMPENSATED?

A. Yes. For ease of reference, AT&T Florida categorized all of the disputed charges associated with interconnection facilities and trunking as a "facilities dispute." Perhaps a better term would be "interconnection dispute." Regardless, the ICA does

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[28] I say 100% or nearly 100% based upon recorded data for Halo's traffic. For example, the January 2012 usage data shows AT&T sent just 435 MOUs to Halo across the entire nine-state AT&T Southeast Region.

[29] McPhee Direct at 7, lines 13-17.

[30] Wiseman Testimony at 76, lines 12-20.

indeed address compensation for trunk groups, and, like the facilities I just discussed, the ICA provides in Section V.B that costs for trunk groups will be apportioned according to the parties' relative use, just like interconnection facilities:

> If the Parties mutually agree upon a two-way trunking arrangement, the following will apply:
>
> BellSouth and Carrier will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement or the General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as amended from time to time. BellSouth will bear the cost of the two-way trunk group for the proportion of the facility utilized for the delivery of BellSouth originated Local traffic to Carrier's POI within BellSouth's service territory and with the LATA (calculated based on the number of minutes of traffic identified as BellSouth's divided by the total minutes of use on the facility), and Carrier will provide or bear the cost of the two-way trunk group for all other traffic, including Intermediary traffic.

As Halo is responsible for 100% (or nearly 100%) of the traffic exchanged between he parties, Halo is responsible for 100% of the costs associated with the cost of the two way trunk group.

Q. IS THE PROPORTIONAL SHARING OF TRUNKING COSTS APPLICABLE ONLY "WHEN HALO USES AT&T-SUPPLIED FACILITIES TO SUPPORT TRUNKING AS ONE OF THE ALTERNATIVES IN IV TO GET TO THE POI" AS MR. WISEMAN CONTENDS?[31]

A. No. As Section V.B.[32] plainly states, the apportioning of trunking costs applies "if the Parties mutually agree upon a two-way trunking arrangement." There is no basis for the notion that Section V.B. (Two Way Trunk Arrangement) is any sort of "alternative" to Section IV (Methods of Interconnection). In order for traffic to be

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[31] Wiseman Testimony at 80, lines 1-3.

[32] Mr. Wiseman mistakenly refers to ICA Section V.C. when he meant V.B.

exchanged between carriers, the carriers must have a means – or method – to interconnect their parties' networks, and they must also have trunking in order to route and exchange traffic. "Methods of interconnection" and "trunking arrangements" are both prerequisites to interconnection; they are not mutually exclusive as Mr. Wiseman suggests.

Q. HOW DO YOU RESPOND TO MR. WISEMAN'S CONTENTION THAT FACILITIES COSTS ARE COVERED BY RECIPROCAL COMPENSATION CHARGES?[33]

A. I have a great deal of experience with reciprocal compensation issues,[34] and I cannot recall any party to an ICA ever having expressed the view that reciprocal compensation charges cover the costs of physical facilities. It is fundamental that reciprocal compensation charges are *per minute usage* charges for the incremental costs incurred to transport and terminate traffic, whereas facilities charges are *non-usage-sensitive recurring charges for the cost of the facilities themselves.*[35]

Q. DOES HALO ADMIT TO ORDERING THE FACILITIES AND TRUNK GROUP ELEMENTS FOR WHICH AT&T FLORIDA SEEKS PAYMENT?

A. Yes. Mr. Wiseman concedes that Halo followed "AT&T's Type 2A interconnection implementation process [that] requires the CMRS provider to submit the order, even when part of what is being 'ordered' pertains to facilities, trunks and other things on

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[33] Wiseman Testimony at 79, lines 4-16.

[34] From 2000 to 2003, I was Product Manager for Reciprocal Compensation at SBC.

[35] To avoid possible confusion, note that because of the facilities cost-sharing arrangement established by the ICA, each party's proportional share of the facilities cost is determined by how that party's usage of the facilities compares with the other party's usage. However, the facilities costs are still "non-usage sensitive" in that the amounts do not depend on the minutes of usage. In other words, if Halo had ten minutes of usage and AT&T had none, Halo's financial responsibility for the facilities costs would be the same as if Halo had a million minutes of usage and AT&T had none.

AT&T's side of the POI."[36] There is also no dispute that AT&T Florida provided the facilities and trunk groups that Halo ordered. Because the ICA clearly states that the costs of these interconnection facilities will be shared based upon each carriers' proportional use, and because Halo is responsible for 100% (or nearly 100%) of the traffic that has been exchanged between the Parties, Halo is 100% responsible for the costs of the facilities and trunk groups. Halo's failure to pay what it owes for these facilities and trunk groups is yet one more breach of the parties' ICA

IV. TERMINATION OF SERVICE TO HALO

Q. MR. WISEMAN TESTIFIES THAT AT&T IS MISTAKEN IN ITS CONTENTION THAT HALO PROVIDES NO VALUE TO COMMUNICATIONS CUSTOMERS, AND THAT HALO IN FACT DOES PROVIDE VALUE AND SO SHOULD NOT BE REMOVED FROM THE MARKETPLACE.[37] HOW DO YOU RESPOND?

A. I have three responses. *First*, if Halo is materially breaching its contract with AT&T Florida, which it is, then the law, as I understand it, entitles AT&T Florida to discontinue performance of the contract, whether or not Halo is providing value to anybody; this is not a policy judgment for the Commission to make based on its assessment of the value Halo provides or does not provide. *Second*, the point that Mr. Neinast made in his direct testimony concerning AT&T Florida's termination of service to Halo was not that it would be harmless because Halo provides no value; rather, it was that it would not cause any consumers to lose dial tone and would not cause any calls not to complete.[38] *Third*, it does not seem to me that Halo provides

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[36] Wiseman Testimony at 80, lines 14-16.

[37] *Id.* at 21, line 12 – 23, line 5.

[38] *See* Neinast Direct at 32, line 5 - 34, line 20.

any meaningful value to consumers in Florida. I mention that with some reluctance, because it is not particularly germane to the determinations the Commission must make, but I did not want to let Mr. Wiseman's claim go unchallenged.

Q. WHAT VALUE DOES MR. WISEMAN SAY HALO PROVIDES?

A. Actually, and intriguingly, he does not say that *Halo* provides any value. He has a question that reads "Does Halo provide any value or benefit to the consumers in Florida?" But in his answer to that question, he contends that *Transcom* provides value; he does not say a word about any benefit provided by Halo, the company of which he is President.[39] Even if it true that *Transcom* provides some value (which I do not believe it does), that does not mean that *Halo* provides any value.

Q. WHAT VALUE DOES MR. WISEMAN SAY TRANSCOM PROVIDES?

A. Here is what Mr. Wiseman says: "[M]ajor providers of communications services voluntarily choose to purchase Transcom's services and incorporate them into the delivery of service to their consumer customers." ***Therefore***, Transcom provides a valuable service, "not only to the service providers" who are Transcom's customers, "but, ***by extension***, to the service providers' end consumers. Thus, if Transcom, and Halo as one of Transcom's service vendors, are removed from the marketplace, this means that the preferred provider of service to these service providers is taken away, forcing these providers to employ their 'second best' choice, assuming they have such a choice."[40]

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[39] Wiseman Testimony at 21, line 12 – 23, line 5.

[40] *Id.* at 22, lines 6-13 (emphasis added).

That makes no sense to me, for two primary reasons. First, Halo claims that it is just one of a number of Transcom vendors – vendors that Halo repeatedly describes as multiple and essentially interchangeable.[41] If *Transcom* provides value, as Mr. Wiseman claims it does, there is no reason to believe that *Transcom* will disappear merely because AT&T Florida discontinues service to *Halo*; Transcom can simply move its traffic to its other vendors. Unless, of course, Halo is, contrary to Halo's own representations, indispensable to Transcom because the two companies inextricably engage together in an access charge avoidance scheme that depends on Halo's unique status among Transcom's supposedly multiple vendors.

Second, Mr. Wiseman's logic is that the service providers that are Transcom's customers must see value in Transcom because they choose to be Transcom's customers, and if there is value for the service providers, it necessarily follows that there is value ("by extension") for their consumer customers. I am not an economist (and neither is Mr. Wiseman), but that seems like an awfully big stretch. If Transcom is providing any value to its customers, it is the avoidance of access charges. And for every dollar of "benefit" that someone is getting by not paying the applicable access charge, AT&T Florida loses a dollar. If we assume, along with Mr. Wiseman, that the savings on his side of the ledger somehow wind up benefiting the consumers on that side of the ledger, doesn't the corresponding loss on the AT&T Florida side of the ledger have a correspondingly negative effect on AT&T Florida's consumer customers? As I understand it, the existing intercarrier compensation regime at least

[41] *See, e.g.,* Johnson Testimony at 11, line 22 - 12, line 1; 12, line 18 - 13, line 5.

attempts to be economically rational, to the ultimate benefit of the consuming public. If that is so, then conduct that distorts or games the system is, one would presume, not beneficial for the consuming public.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

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