

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of TDS)	WC Docket Nos. 10-90, 07-135, 05-337, 03-109
Telecommunications)	GN Docket No. 09-51
Corporation for Limited Waiver)	CC Docket Nos. 01-92, 96-45
of 47 C.F.R. § 51.917(b)(7)(ii))	WT Docket No. 10-208
)	

**COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE
IN SUPPORT OF TDS TELECOMMUNICATIONS CORPORATION
PETITION FOR LIMITED WAIVER OF 47 C.F.R. § 51.917(b)(7)(ii)**

The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby submits its comments¹ in support of the Petition for Waiver filed by TDS Telecommunications Corporation (“TDS”) on August 9, 2012 in the above-captioned proceedings.² TDS seeks a limited waiver of section 51.917(b)(7)(ii) of the Commission’s rules so that it may include in its Carrier Base Period Inter-carrier Compensation (“ICC”) Revenue the amounts owed to it by Halo Wireless, Inc. (“Halo”) in Fiscal Year 2011 (“FY2011”), thereby rendering those amounts eligible for recovery pursuant to the Commission’s Eligible Recovery mechanism.³

¹ See *Wireline Competition Bureau Seeks Comment on TDS Telecommunications Corporation Petition for Limited Waiver of the Commission’s Rules*, WC Docket Nos. 10-90, 07-135, 05-337; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45; WT Docket No. 10-208; Public Notice, DA 12-1416 (rel. Aug. 30, 2012) (“Public Notice”).

² TDS Telecommunications Corporation Petition for Limited Waiver of 47 C.F.R. § 51.917(c), WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208 (filed Aug. 9, 2012) (“TDS Petition”).

³ 47 C.F.R. § 51.917(b)(7)(ii). On February 3, 2012, the Wireline Competition Bureau released an Order changing the internal numbering within section 51.917 of the Commission’s rules such that the rule to which TDS refers in its waiver petition, 47 C.F.R. § 59.917(c), is now numbered as 47 C.F.R. § 51.917(b)(7)(ii).

Without grant of the requested relief, TDS has no hope of being able to recover those revenues, given Halo's bankruptcy status and impending liquidation.⁴ Under the circumstances, it is impossible for TDS to collect payment, even though the Commission and state regulators have determined that the service Halo received is subject to intrastate access charges,⁵ because such agencies are prohibited from enforcing payment pursuant to the Bankruptcy Code.⁶ Moreover, other mechanisms for relief provided in the *USF/ICC Transformation Order*, such as the general USF waiver process⁷ or recoupment of unpaid ICC amounts through the total cost and earnings review process,⁸ are not applicable in this situation. Thus, if TDS is unable to include amounts owed to it by Halo in its Carrier Base Period Revenue, it will be "of enormous consequence to the company and its customers" because it "will limit TDS Telecom's ability to deploy additional network and improve its existing network" to provide greater broadband speeds and other benefits to its subscribers.⁹

ITTA believes that TDS, as well as all other similarly-situated rate-of-return and price cap carriers, should be able to include the FY2011 ICC payments Halo owes to them in their

⁴ *In Re: Halo Wireless, Inc.*, Emergency Motion for Section 105 Status Conference in Order to Establish Procedures for Conversion to Chapter 7, Case No. 11-42464, U.S. Bankruptcy Court for the Eastern District of Texas - Sherman Division (filed July 13, 2012).

⁵ See n. 12-14, *infra*.

⁶ Courts and regulatory agencies of competent jurisdictions are barred from ordering payment due to Halo's bankruptcy court filing. See, e.g., *Complaint and Petition for Relief of Bellsouth Communications, LLC d/b/a AT&T Southeast v. Halo Wireless, Incorporated for Breach of the Parties' interconnection Agreement*, Order Granting Relief Against Halo Wireless, Docket No. 2011-304-C, Order No. 2012-516, Public Service Commission of South Carolina (issued July 17, 2012).

⁷ *In the Matter of Connect America Fund, et al.*, WC Docket Nos. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 539-544 (rel. Nov. 18, 2011) ("*USF/ICC Transformation Order*").

⁸ *Id.* at ¶¶ 924-932.

⁹ TDS Petition at 16.

Eligible Recovery baseline revenues.¹⁰ For years, Halo has evaded its obligation to pay applicable access charges by advancing a number of specious legal theories. Both the Commission and numerous state regulators have rejected Halo's claims, confirming that the access charges at issue were lawfully billed. Halo's longstanding avoidance of its legal responsibilities, now culminating in its anticipated liquidation pursuant to Chapter 7 bankruptcy, make it abundantly clear that it never intended to comply with its obligations. As demonstrated by the TDS petition, fundamental fairness and the public interest dictate that the Commission waive its rules for rate-of-return and price cap carriers harmed by Halo's legal and regulatory gamesmanship.

DISCUSSION

Under the Commission's rules, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.¹¹ As demonstrated below, special circumstances exist with respect to the instant request. Furthermore, grant of the relief requested to TDS and other similarly-situated rate-of-return and price cap carriers would serve the public interest by providing certainty and predictability with respect to the distribution of CAF funding and would enable TDS and other affected carriers to continue to invest in their networks in furtherance of the Commission's goals of achieving universal availability of voice and broadband service.

¹⁰ Granting such relief also would require a waiver of Section 51.915(c) of the Commission's rules, which requires that Price Cap Carrier Base Period Revenue consist of, among other things, FY2011 revenues from Transitional Intrastate Access Service received by March 31, 2012. 47 C.F.R. § 51.915(c).

¹¹ *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, et al.*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, ¶ 88, n. 256 (2007); *see generally* 47 C.F.R. § 1.3.

The circumstances of Halo’s refusal to pay TDS FY2011 intrastate access charges, together with Halo’s recent decision to liquidate its assets and cease operation pursuant to Chapter 7 bankruptcy, provide good cause for granting the relief requested by TDS. As indicated above, both the Commission and state regulators have dismissed the baseless theories asserted by Halo for refusing to meet its legal obligations. Specifically, the Commission in the *USF/ICC Transformation Order* expressly rejected Halo’s “two-call” theory, finding “that the ‘reorigination’ 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.”¹² Notably, this ruling was not new or particularly novel, so Halo undoubtedly was aware of the Commission’s position that its calls were not somehow transformed in the manner Halo described, and always have been subject to lawful access charges.

In addition, the Tennessee Regulatory Authority, the Public Service Commission of Wisconsin, and the Georgia Public Service Commission have all ruled that Halo owes intrastate access charges on traffic sent to TDS.¹³ The Michigan Public Service Commission, the Missouri Public Service Commission, and the Public Service Commission of South Carolina have issued similar rulings with respect to other carriers that have provided similar services to Halo.¹⁴

Due to Halo’s steadfast refusal to pay the amounts it lawfully owes, TDS was unable to collect payment for amounts that were properly and lawfully billed to Halo by the March 31, 2012 deadline set forth in the *USF/ICC Transformation Order*. Now, in light of Halo’s decision to liquidate, TDS and other similarly-situated carriers “are virtually assured that they never will

¹² See *USF/ICC Transformation Order* at ¶¶ 979, 1005-1006.

¹³ See, e.g., TDS Petition at 7 (identifying the Tennessee Regulatory Authority, Public Service Commission of Wisconsin, and Georgia Public Service Commission as having ruled in TDS Telecom’s favor).

¹⁴ See *id.* (identifying the applicable agencies as having reached such conclusions).

receive the payment they are owed, as Halo’s creditors reportedly are many and its assets are few.”¹⁵ The inequity of this situation is further compounded by the fact that TDS and other carriers must continue to terminate traffic for Halo in jurisdictions that have not ruled on such issues because they may be found in violation of their common carrier regulatory obligations if they fail to do so.

Although the *USF/ICC Transformation Order* permits carriers to seek a waiver of the March 31, 2012 deadline for including in their Eligible Recovery baseline funds that are subsequently recovered “as the result of the decision or a court or regulatory agency of competent jurisdiction,” this process offers no relief to TDS because any court or regulatory agency of competent jurisdiction expected to order payment is barred from doing so due to Halo’s bankruptcy court filing and decision to liquidate.¹⁶

Furthermore, the other mechanisms for relief set forth in the *USF/ ICC Transformation Order* – i.e., the total cost and earnings review or USF waiver processes – do not apply to the facts at issue here, and would be overly burdensome considering the specific, limited relief TDS seeks. The total cost and earnings review process was designed to address situations in which a carrier believes that the terms of the *USF/ICC Transformation Order* violate the Takings Clause of the Fifth Amendment to the U.S. Constitution, and no such claim is being made here.¹⁷ The USF waiver approach was designed to address situations in which the absence of relief would “put consumers at risk of losing voice services, with no alternative terrestrial providers,” and such risk is not involved here.¹⁸ More important, even if these procedures could provide the

¹⁵ *Id.* at 8.

¹⁶ *USF/ICC Transformation Order* at ¶ 898.

¹⁷ *Id.* at ¶ 924.

¹⁸ *Id.* at ¶ 540.

relief TDS requires, Halo has confirmed that it lacks sufficient assets to pay the amounts it owes in the Chapter 7 bankruptcy proceeding.¹⁹ Given the circumstances, strict compliance with the Commission's rules would be inconsistent with the public interest.

In fact, allowing TDS to include in its Carrier Baseline Revenues amounts unpaid by Halo is entirely consistent with the *USF/ICC Transformation Order* because it allows the Commission's rules to operate as intended. That is, it would allow TDS to avail itself of the mechanism adopted by the Commission that allows the inclusion of FY2011 revenues in carriers' Eligible Recovery baseline, even though the particular scenario at issue was not and could not have been foreseen by the Commission when it adopted this process.²⁰ In other words, granting the TDS Petition would permit the mechanism the Commission designed to protect carriers' ability to define in their baseline revenues access charges that were properly and lawfully billed to work effectively.

Absent grant of the relief requested, the public interest would not be served. If the Commission does not grant the TDS Petition, and extend such relief to all similarly-situated rate-of-return and price cap carriers, the amount such carriers will be able to recover will be dramatically reduced despite their lawful provision of intrastate access service and legitimate, ongoing efforts to collect the revenues owed by Halo. Assuming the Commission's Recovery Mechanism is in effect over the next 20 years, exclusion of such unpaid amounts from carriers' Eligible Recovery baseline will only increase the negative impact of Halo's regulatory and legal gamesmanship exponentially over time. The inability to recover such amounts thus will limit

¹⁹ *In Re: Halo Wireless, Inc., Debtor*, Case No. 11-42464, Emergency Motion for Section 105 Status Conference in Order to Establish Procedures for Conversion to Chapter 7, ¶ 10 (filed July 13, 2012) (conceding that if Halo is required to pay access charges, then "it would be pointless to litigate whether the 'correct' amount is one-half or three-quarters of what the claimants assert is due, since Halo has no means to fund a plan that would address even these amounts").

²⁰ *USF/ICC Transformation Order* at n. 1745. *See also* TDS Petition at 12.

TDS' and other carriers' ability to continue to deploy additional broadband infrastructure and improve existing networks to provide greater broadband speeds and other benefits to subscribers.

One of the Commission's most important objectives in recent years has been to facilitate universal broadband access and adoption for all Americans, particularly for consumers in rural areas such as those where TDS and similar providers offer service.²¹ Access to robust broadband service is "crucial to our nation's economic growth, global competitiveness, and civic life. Businesses need broadband to attract customers and employees, job-seekers need broadband to find jobs and training, and children need broadband to get a world-class education."²² Indeed, the job opportunities broadband access makes available "are critical to our nation's economic recovery and long term economic health, particularly in small towns... [and] rural and insular areas."²³

Given the importance of the goal of universal broadband access, no policy basis exists to deny the relief requested to TDS and all other carriers harmed by Halo's illegal tactics when it would help achieve the basic intent of the Commission's rules. In fact, denial of the TDS Petition would suppress investment and subvert the Commission's wider broadband deployment initiatives. Granting TDS' request, and extending such relief to all other similarly-situated carriers, will ensure that such carriers are able to receive sufficient and predictable funding through the Connect America Fund that will enable them to continue to invest in new and existing broadband infrastructure and further the Commission's mission to ensure that all Americans have the opportunity to subscribe to quality, affordable broadband services where they live, work, and travel.

²¹ *USF/ICC Transformation Order* at ¶ 5.

²² *Id.* at ¶ 3 (internal citations omitted).

²³ *Id.*

CONCLUSION

For all of the foregoing reasons, the Commission should expeditiously grant the TDS Petition and extend the requested relief to all similarly situated rate-of-return and price cap carriers.

Respectfully submitted,

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