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July 12, 2012

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PUBLIC SERVICE
COMMISSION

VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: BellSouth Telecommunications, LLC, d/b/a AT&T
Kentucky, Complainant v. Halo Wireless, Inc., Defendant
PSC 2011-00283

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of AT&T Kentucky's Memorandum in Opposition to Halo's Objections and Motions to Strike AT&T Kentucky's Direct Testimony.

Please let me know if you have any questions.

Sincerely,



Mary K. Keyer

Enclosures

cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of)
)
 BELLSOUTH TELECOMMUNICATIONS,)
 LLC d/b/a AT&T KENTUCKY,)
)
 Complainant,) Case No. 2011-00283
)
 v.)
)
 HALO WIRELESS, INC.,)
)
 Defendant.)

**AT&T KENTUCKY’S MEMORANDUM IN OPPOSITION TO
HALO’S OBJECTIONS AND MOTIONS TO STRIKE
AT&T KENTUCKY’S DIRECT TESTIMONY**

BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky (“AT&T Kentucky”) respectfully submits this memorandum in opposition to Halo Wireless, Inc.’s Objections to and Motions to Strike virtually all of the direct testimony filed by AT&T Kentucky in this matter, namely, the Direct Testimony of J. Scott McPhee and the Direct Testimony of Mark Neinast. AT&T Kentucky’s testimony is similar in kind to that which this Commission routinely, and properly, admits, and Halo’s motions to strike are frivolous. Halo has filed virtually identical motions in all of the state commission proceedings in which the parties are litigating the same issues, and all eight state commissions that have considered Halo’s motions to strike AT&T’s testimony have denied them – Wisconsin, Tennessee, South Carolina, Georgia, Illinois, Missouri, Louisiana and Florida.¹ That should be the result here as well.

¹ See **Attachments A through H.**

Kentucky law governing admission of evidence in this proceeding forecloses Halo's motions. KRS § 278.310 specifically provides: "All hearings and investigations before the commission or any commissioner shall be governed by rules adopted by the commission, and in the conduct thereof neither the commission nor the commissioner shall be bound by the technical rules of legal evidence." In keeping with the statute, the Commission has recognized that it is not bound by the rules of evidence. See, e.g., *Southeast Tel., Inc.*, Case Nos. ID 138903, 2003-00115, 2003 WL 23336333 (Ky. P.S.C. Dec. 19, 2003) ("KRS 278.310 provides that, in conducting its hearings, the Commission is not 'bound by the technical rules of legal evidence.' . . . Further, Commission Staff's purpose is to ensure that all relevant facts are brought before the Commission, and that positions taken by the parties are adequately probed at hearing, so that the Commission can reach its decision based on a complete record.").

That alone is sufficient to defeat Halo's motion. Since the technical rules of evidence do not apply, and since Halo's motions are based on technical rules of evidence, the motions must be denied. Indeed, the testimony Halo seeks to strike is precisely of the type that this Commission routinely relies upon in the conduct of its proceedings.

Moreover, Halo's objections are defective on their face. Halo seeks to strike the bulk of AT&T Kentucky's pre-filed testimony, yet its motions cite no pertinent law and contain no analysis of any of the testimony to which Halo is objecting. All Halo does is identify portions of testimony by page and line number, and then repeat the same boilerplate objections over and over. Halo never tries to explain how any of its boilerplate objections apply to any particular portion of testimony or how any part of the

pre-filed testimony fails to meet the very broad admissibility standard that applies in this Commission. Indeed, Halo never discusses the actual content of the testimony at all. Given this utter absence of analysis and explanation, Halo's objections fail at the outset. As the South Carolina Commission observed when it denied Halo's virtually identical objections to virtually identical testimony in AT&T South Carolina's complaint case against Halo there, "Both Halo's objections and its Motions are conclusory, and, for the most part, fail to explain how any of the conclusions stated apply to any particular aspects of the testimonies. . . . Halo has not related any specific principle of law that would dictate exclusion of any of the witnesses' testimony." Attachment C at 1. It is not the Commission's task to hunt through testimony and try to decipher what Halo is talking about.

Beyond being facially inadequate, Halo's conclusory objections are without merit. Halo's objections to both pieces of AT&T Kentucky's testimony are substantially identical (though the testimony is not), so AT&T Kentucky will address them together. Halo first contends that the testimony contains inadmissible "conclusions of law," but it identifies no such inadmissible conclusions – because there are none. At appropriate points in their testimony, AT&T Kentucky's witnesses provide context by informing the Commission of relevant orders, contractual provisions, and similar matters that bear on the evidence they present. They also inform the Commission of AT&T Kentucky's positions regarding those matters. In doing so, they take appropriate care to leave it to AT&T Kentucky's attorneys to present the legal argument supporting those positions in briefs (in contrast to Halo's witnesses, who go on for page after page with the details of Halo's legal argument, all under the guise of "my counsel advises me that . . ."). This

common practice of putting regulatory testimony in the context of applicable rules, decisions, and contractual provisions is entirely appropriate and does not render any aspect of the testimony inadmissible. Attachment A at 3 (“Commission practice supports the presentation of facts in an organized and meaningful way. Often the way to offer meaningful presentation of the facts requires a witness to describe the applicable law, as the witness perceives it, to provide the context necessary to make an informed decision.”).

Halo next contends that the testimony lacks “a foundation of personal knowledge and/or reliance on admissible hearsay,” but again fails to identify any particular statements that lack foundation. Mr. Neinast and Mr. McPhee make clear that their testimony is based both on the broad knowledge of the industry that they have developed as longtime AT&T employees and on specific knowledge they have developed from personally investigating the facts in this case. While Halo is free to cross-examine these witnesses, its attempt to prevent them from testifying at all is baseless. *Id.* at 2 (“[T]he [McPhee and Neinast] testimony relies on data either provided by the movants or gathered through standard industry practices. Each witness’s education, experience and company position provide sufficient basis to rely on the offered facts and analysis.”).

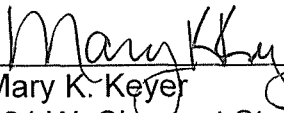
Halo’s claim that the testimony “lacks foundation” for an “expert opinion” is, like the rest of its objections, unexplained and unfounded. Halo appears to disagree with the methods and sources used in the call analyses that Mr. Neinast sponsored, but such claims go at best to the weight of the testimony, not its admissibility, and Halo can make its own contrary case through testimony and cross-examination. See Attachment

A at 2 (rejecting Halo's motion to strike because "[d]etermination of the validity and proper weight of probative evidence occurs not on a procedural motion, but as part of the Commission's review of the entire record. An opposing party may contest the validity and weight of evidence through rebuttal and cross-examination."); Attachment C at 1 (rejecting motion to strike because Halo's "objections go to the weight, rather than the admissibility of the evidence. All parties will have full cross-examination rights of all witnesses presented, thereby allowing the Commission to fully weigh the merits of the evidence."). Likewise, Halo's assertions that the testimony is "self-serving,"² "speculative," "demonstrably untrue," or not the "best evidence" of the facts are not merely unsupported, but also would go, at most, only to the weight of the testimony, not its admissibility.

For these reasons, the Commission, like all eight other state commissions that have considered Halo's baseless objections, should reject them and deny Halo's motions to strike.

WHEREFORE, for the foregoing reasons, AT&T Kentucky respectfully requests that Halo's motions to strike AT&T Kentucky's direct testimony be denied.

Respectfully submitted,

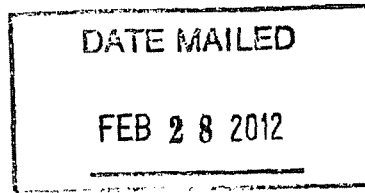

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² Halo's objection that the testimony is "self-serving" is especially ludicrous. Would Halo suggest that its witnesses' pre-filed testimony is not self-serving? The parties' briefs will be self-serving as well.

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1040262



PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation into Practices of Halo Wireless, Inc., and Transcom
Enhanced Services, Inc.

9594-TI-100

Public Service Commission of Wisconsin
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ORDER ON MOTIONS TO STRIKE

This order, pursuant to Wis. Admin. Code § PSC 2.04(1), denies the following Halo Wireless, Inc., and Transcom Enhanced Services, Inc., objections to direct prehearing testimony:

- Mark Neinast PSC REF#: 159344
- J. Scott McPhee PSC REF#: 159343
- Thomas McCabe PSC REF#: 159342
- Linda Robinson PSC REF#: 159345
- Lois L. Ihle PSC REF#: 159341

Wisconsin Rural Local Exchange Carriers, AT&T Wisconsin, and TDS Telecom Companies responded (PSC REF#: 159771, 159763 and 159759).¹ Movants replied (PSC REF#: 159877).

To conform the objections to Commission practice, this order deems each objection a Motion to Strike. On a Motion to Strike, movants carry the burden of demonstrating that the subject testimony fails to satisfy the applicable evidentiary standard as applied through Commission practice. This burden movants failed to carry.

Through separate motions, each applicable to one opposing party witness, movants make three practically identical objections. First, movants make a general objection claiming the

¹ The TDS Telecom Companies' response also requests a protective order from the movants' requests for "any data and other information underlying [the witness's testimony]" (PSC REF#: 159759 at 7). TDS correctly identifies the statement as improper and unenforceable to the extent one could consider it a discovery request.

Docket 9594-TI-100

witnesses use data in a manner not acceptable to experts in the field and, therefore, inadmissible as expert testimony.

However, this objection amounts to a misplaced critique of the validity and weight of the testimony. Determination of the validity and proper weight of probative evidence occurs not on a procedural motion, but as part of the Commission's review of the entire record. An opposing party may contest the validity and weight of evidence through rebuttal and cross-examination. This practice applies regardless of how the party attempts to label testimony.

Second, movants object to the admission of the subject testimony for lack of personal knowledge. However, the testimony relies on data either provided by the movants or gathered through standard industry practices. Each witness's education, experience and company position provide sufficient basis to rely on the offered facts and analysis. The Commission typically admits data of this nature. Therefore, sufficient foundation exists.

Moreover, to bar the admissibility of this evidence, movants assert a standard foreign to Wisconsin. Recently, the Tennessee Regulatory Authority (TRA) heard a case involving, for practical purposes, the same issues and parties.² Movants submitted objections to the testimony of opposing party witnesses that were practically identical to the instant motions.³

Tennessee administrative law recognizes the inadmissibility of hearsay in contested cases, but allows the admission of hearsay for evidence, "of the type commonly relied upon by

² *In Re: Complaint of Concord Telephone Exchange, Inc., Humphreys County Telephone Co., Tellico Telephone Company, Tennessee Telephone Company, Crockett Telephone Company, Inc., Peoples Telephone Company, West Tennessee Telephone Company, Inc., North Central Telephone Coop., Inc., and Highland Telephone Cooperative, Inc., Against Halo Wireless, LLC, Transcom Enhanced Services, Inc., and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and Other Relief and Authority to Cease Termination of Traffic*, Tennessee Regulatory Authority, Docket No. 11-00108.

³ *Objections to Rebuttal Testimony of Linda Robinson*, TRA, Docket No. 11-00108, January 23, 2012; *Objections to Rebuttal Testimony of Thomas McCabe*, TRA, Docket No. 11-00108, January 23, 2012; *Objections to Direct Testimony of Thomas McCabe*, TRA, Docket No. 11-00108, January 23, 2012; *Objections to Direct Testimony of Linda Robinson*, TRA, Docket No. 11-00108, January 23, 2012.

Docket 9594-TI-100

reasonably prudent men in the conduct of their affairs.”⁴ Movants asserted that the opposing party witness failed to meet this standard. The TRA overruled these objections.⁵

Notwithstanding the persuasive precedent of the TRA ruling, the instant motions fail on different grounds. In Wisconsin, the standard for admissibility of evidence in a contested case is far less restrictive than in Tennessee. A Wisconsin administrative agency: (1) may accept evidence outside the standards of “common law or statutory rules of evidence,”(2) “shall admit all testimony having reasonable probative value,” and 3) shall exclude “immaterial, irrelevant or unduly repetitious testimony” [Wis. Stat. § 227.45(1)].

This order denies the motions because movants failed to apply the correct standard and presented no basis for excluding the subject testimony according to it. Furthermore, no such basis exists.

Finally, movants object to the alleged presence of legal conclusions in the subject testimony. The presentation of legal argument is properly reserved to briefs. However, Commission practice supports the presentation of facts in an organized and meaningful way. Often the way to offer a meaningful presentation of the facts requires a witness to describe the applicable law, as the witness perceives it, to provide the context necessary to make an informed decision. Also, the record benefits from testimony that documents a party’s position on a mixed question of law and fact offered by a witness with particular expertise, background or experience with the case.

⁴ In contested cases:

(1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.
TCA 4-5-313.

⁵ *Transcript of Proceedings*, TRA, Docket No. 11-00108, January 23, 2012, at 7-8.

Docket 9594-TI-100

Moreover, granting the Motions on the ground that the subject testimony contains legal conclusions would call into question the validity of movants' prehearing testimony because it is riddled with the same. Instead of negating the efforts made in this proceeding to date, by excluding the bulk of the prehearing testimony, prudence and efficiency dictate the process continue to run on its course.

Monday, February 27, 2012

A handwritten signature in black ink, appearing to read "Michael E. Mewmark", written over a horizontal line.

Michael E. Mewmark
Administrative Law Judge

MEN::00462086 Order on Motions to Strike.docx

In The Matter Of:

In Re: BellSouth Telecommunications, LLC d/b/a AT&T

TN v.

Halo Wireless, Inc.

Transcript of Proceedings

January 17, 2012

nashvillecourtreporters

"Quality: Your work demands it... Our work reflects it."

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Original File F01-17-12 TRA 11-00119.txt

Min-U-Script®

1 Q. Were those pieces of testimony prepared
2 by you or under your direction?

3 A. Yes, they were.

4 Q. Do you have any corrections to either
5 piece of testimony at this time?

6 A. No.

7 Q. If I were to ask you the same questions
8 set forth in the testimony today, would you give the
9 same answers?

10 A. Yes.

11 MR. COVEY: I move the admission of
12 Mr. McPhee's direct and rebuttal testimony, including
13 the exhibits, and make him available to issue his
14 opening statements.

15 CHAIRMAN HILL: Without objection.

16 MR. THOMAS: We do have an objection.

17 CHAIRMAN HILL: Okay. Please make it.

18 MR. THOMAS: We would like to take the
19 witness on voir dire to test the credibility of the
20 witness and his statements in the testimony and to
21 determine whether there's a proper foundation been laid
22 for the testimony.

23 MS. PHILLIPS: If I could just briefly
24 respond to that objection.

25 CHAIRMAN HILL: You may.

1 MS. PHILLIPS: Thank you. The
2 practice of the Authority has been consistent with
3 Tennessee State statute that the Rules of Evidence do
4 not bind this Authority. As a result, we do not follow
5 that sort of process of asking questions first to find
6 out whether you will ask questions of a witness.

7 And so what we would suggest is that
8 if counsel for Halo wants to ask the witness questions
9 on cross, that they ask those questions on cross. If
10 they think those questions somehow form a basis to ask
11 the Authority not to allow this witness to testify,
12 then they can make that argument.

13 But I fear that if we're going to
14 question all the witnesses twice, once to see if we're
15 going to question them and then to ask them their
16 questions, we're going to be here for a longer time
17 than is necessary.

18 MR. THOMAS: May I respond, Chairman?

19 CHAIRMAN HILL: You may.

20 MR. THOMAS: Regardless of the
21 applicability of the evidence rules, there are still
22 rules that govern whether evidence is admissible for
23 purposes of using it as testimony for the Authority to
24 rule on.

25 As the Authority itself has previously

1 said: (As read) Despite the leeway granted to the
2 Authority in admitting and valuing certain evidence,
3 the purpose of prefiled testimony, expert or otherwise,
4 presented for the consideration of the Authority
5 remains constant to substantially assist the Authority
6 in understanding the evidence or determining of fact in
7 issue in the case. (End of reading.) That was in the
8 Chattanooga -- March 2, 2009, In Re Chattanooga
9 proceeding.

10 And the point behind my voir dire is
11 to show that none of this testimony is based on
12 personal knowledge, none of this testimony is based
13 upon any expert opinion. It is all essentially a
14 reassertion of the positions taken by the legal
15 counsel. Most of it is legal opinion, and, therefore,
16 it does not -- it does not serve the purposes of the --
17 of evidence for this Authority and is objectionable.

18 And so we take the position -- Halo
19 takes the position that we believe we have the right to
20 conduct voir dire, but if we do not -- if we are not
21 afforded that right, we object to the admission of the
22 testimony because we believe that none of it is
23 credible, trustworthy, reliable testimony on which the
24 Authority may rely.

25 CHAIRMAN HILL: Mr. Thomas, I've heard

1 what you have to say, and I understand what you're
2 saying; however, I think that you are a competent
3 counsel for your client and in your cross-examination I
4 believe that you can bring out the points that you need
5 to bring out without us going through the Rules of
6 Evidence.

7 MR. THOMAS: And on that point, may
8 I -- I simply make my objection and I would only ask
9 that you overrule it.

10 CHAIRMAN HILL: The objection is
11 overruled and it is part of the record.

12 MR. THOMAS: Thank you.

13 (Prefiled testimony entered
14 into the record.)

15 CHAIRMAN HILL: All right. Mr. Covey.

16 BY MR. COVEY:

17 Q. Mr. McPhee, are you ready to make your
18 opening statement?

19 A. I am. Good morning. My name is Scott
20 McPhee and I'm employed by AT&T.

21 I submitted testimony in this proceeding
22 that addresses the interconnection agreement between
23 AT&T Tennessee and Halo Wireless, as well as several
24 ways in which Halo has breached the agreement.

25 In April 2010, the parties entered into the

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CHAIRMAN HILL: If you would.

MR. THOMAS: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. THOMAS:

Q. Good morning, Mr. McPhee. My name is Steve Thomas.

A. Good morning.

Q. I represent Halo Wireless Services -- Halo wireless, Inc.

would you confirm -- your testimony says that you were -- you have degrees from the University of California at Davis in economics and political science. Do you have any other degrees?

A. I do not.

Q. Are you an attorney?

A. No.

Q. Have you ever had any legal training?

A. No.

Q. Have you ever been to Halo's facilities?

A. I have not.

Q. Have you ever discussed anything with any of Halo's personnel?

A. No.

Q. Have you ever had an opportunity to directly take data of call information for Halo

1 calls?

2 A. Can you please explain what you mean by
3 "directly take data"?

4 Q. By you actually putting in the
5 instructions where you obtained the data as it came
6 from the call stream.

7 A. I have not input any instructions to
8 obtain data.

9 Q. Have you taken any other steps where
10 you -- from a scientific or technical point of view
11 conducted any study or analysis that you would use
12 to -- on any data of Halo?

13 A. I'm sorry. Could you -- I guess I need
14 to understand what you mean by "study or analysis."

15 Q. In any way have you conducted a
16 scientific study or analysis of any data of Halo?

17 A. I have seen studies of data from Halo.
18 I'm not sure I understand your term "scientific
19 study," but I have looked at the studies. I have
20 not directed the collection of the data for those
21 studies.

22 Q. So all of the information that you have
23 was provided to you by third parties; is that
24 correct?

25 MR. COVEY: If I could ask for

1 end users --

2 CHAIRMAN HILL: We're going to recess
3 for five minutes. We'll be back.

4 You are under oath. Don't talk while
5 you're gone.

6 (Recess taken from 9:59 a.m.
7 to 10:06 a.m.)

8 DIRECTOR KYLE: Thank you. I'm ready
9 to move on.

10 CHAIRMAN HILL: Is everybody situated?
11 Let me remind the witness you are still under oath.
12 All right. You may continue.

13 BY MR. THOMAS:

14 Q. Thank you, Mr. McPhee. The point that I
15 was trying to make is that if a court disagrees with
16 you that it's landline-originated, then the court
17 would trump, would it not?

18 A. I will leave that to the attorneys to
19 decide. It sounds like a legal issue.

20 Q. Exactly. And so because this is a legal
21 term, it's not something that you have expertise on?

22 A. Well, I disagree, because in my
23 experience of 12 years of dealing with intercarrier
24 compensation, the term is commonly used in order to
25 describe call scenarios. So --

1 Q. Go ahead and finish your answer. I'm
2 sorry.

3 A. So I do feel a bit -- that I have an
4 understanding of what a landline-originated call
5 means for purposes of my testimony and for purposes
6 of intercarrier compensation.

7 Q. You have an understanding of what you
8 understand "landline-originated" means, and all I'm
9 trying to point out is you may not agree -- or a
10 court may not agree with you on that and a court
11 would trump, wouldn't it?

12 A. I understand that there may be a legal
13 definition where the lawyers might have a different
14 understanding or there might be a different
15 definition, but, as I said, in my industry
16 experience, I do use the term and it is commonly
17 used.

18 Q. You use the term "disguising" and
19 "manipulating" -- those two terms in that sentence
20 that follows, didn't you?

21 A. I did.

22 Q. With that, you implied, didn't you, that
23 Halo was intentionally trying to deceive AT&T,
24 didn't you?

25 A. I don't say specifically that Halo is

1 intentionally doing it. I say that the traffic was
2 disguised and the call records were manipulated.

3 Q. So you think that there's a possibility
4 that someone could accidentally disguise and
5 accidentally manipulate?

6 A. I don't know what the intention may be
7 behind somebody disguising or manipulating. I'm
8 just describing the characteristic of the traffic
9 and the call records.

10 Q. So you don't have personal knowledge of
11 anything -- you don't have personal knowledge of
12 anything that Halo did, do you?

13 A. I'm sorry? In what respect?

14 Q. You don't have personal knowledge of
15 anything -- any action that Halo has ever taken, do
16 you?

17 A. I disagree with that.

18 Q. How would you have personal knowledge if
19 you've never had any interaction with Halo or its
20 employees?

21 A. I have not literally stood over
22 anybody's shoulder at Halo and watched them do
23 things. I do have knowledge of --

24 Q. Let me clarify my question. I'm sorry.
25 It was an improper question.

1 "Personal knowledge" means that you saw it,
2 you experienced it. If you don't have personal
3 knowledge, then you're relying on something someone
4 else told you, something that came from a document,
5 something that came from someone telling you something.
6 It's hearsay. It's something you've been told and so
7 you're repeating it or you're using it to analyze
8 without knowing what the source of that is.

9 So the difference between personal
10 knowledge and the type of knowledge you're talking
11 about -- you're not talking about personal knowledge.
12 Do you understand that?

13 MS. PHILLIPS: Chairman Hill, could I
14 just clarify for the record?

15 CHAIRMAN HILL: You may.

16 MS. PHILLIPS: AT&T is happy to
17 stipulate that Mr. McPhee has based his testimony on
18 things like looking at the call detail, looking at call
19 studies, looking at communications from Halo. We are
20 not suggesting that Mr. McPhee witnessed with his eyes
21 call detail being input by Halo.

22 I hate for us to waste a lot of time
23 on the legal, technical definition of what is personal
24 knowledge. I think within the context of the ordinary
25 practice of this agency, in order to not have 15

1 different witnesses who say, yes, I'm the one who
2 looked at the computer screen and I pulled the call
3 detail, and then have somebody else say I looked at the
4 call detail and I handed it to Mr. McPhee, Mr. McPhee
5 is describing what he understands has happened here and
6 how that interrelates with the contract. We are not
7 suggesting that Mr. McPhee has visited Halo.

8 And I don't believe Mr. McPhee has
9 testified anything about their intent. The call study
10 that was included in the prefiled testimony is included
11 in someone else's prefiled testimony, and I think we
12 might could move through this a little more quickly if
13 we just stipulate he is a fact witness. He is not
14 offering an expert legal conclusion. He is simply
15 describing his understanding of the information that
16 came from other parties and whether that is consistent
17 with the interconnection agreement of the parties.

18 And I say that on the record because I
19 just want to try to cut through some of the evidentiary
20 sort of discussion about the competence of the witness.

21 CHAIRMAN HILL: And so then, if I may,
22 you would -- forgive me if I -- I don't mean this to be
23 a leading question, but would you agree to the fact
24 that your witness has not -- he has not been to Halo.
25 He hasn't talked to Halo. He hasn't had a

1 psychological profile done on anybody at Halo. That
2 what he has to say should not be inferred -- there
3 should be no inference that he has that knowledge. Is
4 that what I'm hearing?

5 MS. PHILLIPS: I think those are all
6 correct statements, in large part because our case does
7 not allege any intent on Halo's part. We're not making
8 a fraud claim. We're saying that they breached the
9 contract.

10 So this testimony is about what they
11 did, not what they intended, not what their motivations
12 were. And Mr. McPhee is testifying based on his
13 understanding of material he has reviewed from other
14 people as opposed to interacting face-to-face with
15 Halo, and we would contend that that is commonly
16 accepted as reliable and proper testimony here at the
17 Authority.

18 And we will not be objecting to Halo's
19 witnesses who also rely on -- describe industry
20 practices and rely on things that their lawyers told
21 them, because we recognize that is the efficient way to
22 raise these issues in this commission.

23 CHAIRMAN HILL: And so your witness
24 appears as an analyst of what he has seen?

25 MS. PHILLIPS: He is describing what

1 he has seen. He has not performed any sort of expert
2 analysis or the kinds of things that expert witnesses
3 do. He is describing his conclusions based on other
4 things that he has observed or learned, yes, sir.

5 CHAIRMAN HILL: Thank you.

6 MR. THOMAS: May I make two points,
7 Your Honor?

8 CHAIRMAN HILL: You may.

9 MR. THOMAS: First of all, I apologize
10 that I am not well experienced in dealings before the
11 Tennessee Regulatory Authority or proceedings like
12 this, but I have been representing clients for many
13 years. And when someone says that my client is
14 disguising, when they say that my client is
15 manipulating, or on the next page when they say that my
16 client is perpetuating a scheme, it appears to me that
17 that is a specific statement -- an accusation that my
18 client is engaged in unlawful conduct intentionally,
19 and I have a right to defend my client against those
20 accusations.

21 But, second, if counsel for AT&T will
22 stipulate that Mr. McPhee has no personal knowledge of
23 the matters on which he is testifying regarding Halo,
24 then I think we can leave all of that -- all of these
25 issues behind.

1 MS. PHILLIPS: Chairman Hill, AT&T
2 will not stipulate that this witness does not have
3 personal knowledge. He has a great deal of personal
4 knowledge. He has personally evaluated the information
5 that all folks in the telecom industry use to decide
6 whether folks are complying with their interconnection
7 agreements. We certainly are not going to do something
8 in Tennessee -- the first state commission to take up
9 these issues -- to create the ability for Halo to go
10 around to other places, well, AT&T has agreed that
11 their witnesses don't have any knowledge, that their
12 witnesses aren't competent, and that is all this
13 exercise appears to be about.

14 MR. THOMAS: No. You're wrong.

15 MS. PHILLIPS: What I would suggest
16 is -- I hoped by raising this that we could cut to the
17 chase and relieve Halo of feeling the obligation to
18 create a lot of record here that they have questioned
19 the competence of the witness. Obviously, that isn't
20 going to make things go more quickly; it's just going
21 to draw things out. So we would just suggest that -- I
22 think both parties have made their point on the record
23 and maybe we can get back to asking questions of the
24 witness.

25 CHAIRMAN HILL: If I may restate then

1 what I heard you say, Ms. Phillips, you're not accusing
2 fraud, you're not -- you're not exposing in any fashion
3 something that you've discovered. All you're talking
4 about here is whether or not there was a breach of the
5 agreement; is that correct?

6 MS. PHILLIPS: We are talking about --
7 our claim is that there has been a breach of the
8 agreement. Now, it certainly makes it more likely in
9 the -- for the fact finder to determine that a breach
10 occurred when we explain what the motivation might have
11 been for doing those things. We do believe that the
12 reasons that Halo has made -- has inserted call detail
13 that isn't normally inserted is for the purpose of
14 making their traffic look like something it isn't.

15 We are not making a fraud claim,
16 though. We don't have to prove what was in their
17 heart. And all I'm suggesting is that, you know, the
18 word "disguise" means make something look like
19 something else, and that's what I think the witness
20 means. And "manipulate" means, you know, change
21 something. That is what I think has happened.
22 "Scheme" -- I'm sorry if that word feels a little
23 unpleasant, but "scheme," you know, means a design, a
24 plan, a purpose to do something.

25 And we do believe that they have

1 engaged in this purposefully to pay a lower rate than
2 is required by the contract, but all of those claims
3 relate to breach of contract. And I do not want to
4 concede that we are obligated to prove that they had
5 some evil intent, because breach of contract claims
6 don't require that.

7 CHAIRMAN HILL: So what you're trying
8 to -- what I'm trying to hear here -- I think you're
9 trying to tell me is that these words are used without
10 prejudice and are not necessarily malevolent in their
11 usage?

12 MS. PHILLIPS: Absolutely.

13 CHAIRMAN HILL: What I'm -- I mean, I
14 can understand -- I mean, you know, there's a famous
15 lawyer named Shylock, so we understand that that set a
16 precedent for certain views of attorneys. And so words
17 are powerful, but I'm understanding, for the record,
18 that you're telling me that this is not used with any
19 prejudice, these words are not?

20 MS. PHILLIPS: They are not intended
21 to offend.

22 CHAIRMAN HILL: However, apparently,
23 they do offend.

24 MR. THOMAS: Chairman, if I might
25 respond. Page 4, line 15 of Mr. Neinast's testimony

1 comes straight out and says that this is an attempt to
2 defraud by Halo. This is evidence -- they are asking
3 that you admit this information as evidence. We are
4 objecting to that evidence in cross-examining to show
5 they don't have any basis for these claims of fraud or
6 scheme or manipulation or disguising.

7 Second, there are only two types of
8 witnesses in any kind of proceeding you want to put
9 together in this country, and that is a fact witness or
10 an expert witness. AT&T has said he is a fact witness.
11 Under Tennessee law, he cannot testify unless he has
12 personal knowledge. We have the right to object to his
13 testimony being admitted because he has no personal
14 knowledge of any of the facts that he has put into his
15 testimony. They are all of the type of facts that
16 would be presented by an expert witness.

17 It has been right here on the record
18 said by AT&T he is not an expert witness. He is a fact
19 witness. Absolutely none of this testimony can come in
20 for that reason, and we object to its admission.

21 MS. PHILLIPS: Chairman Hill, we don't
22 agree that personal knowledge for purposes of admitting
23 evidence at the Tennessee Regulatory Authority has the
24 meaning that was just described. This testimony is
25 based on this witness's industry understanding, his

1 actual experience, his actual evaluation of what has
2 happened.

3 I'm sorry. I just disagree with
4 what's being described. This is a perfectly competent
5 witness of the same nature that this agency routinely
6 relies upon in cases of this nature.

7 CHAIRMAN HILL: Well, the objection is
8 noted, but it's my opinion that the witness has the
9 right to make his statements. You also have the right
10 to question them, Counsel, and I understand that. And
11 so let's proceed, shall we?

12 MR. THOMAS: Your Honor, I have made
13 an objection to the admission of his evidence based on
14 the admission by AT&T that he is not an expert, that he
15 is a fact witness. I presented that objection to the
16 Authority. It sounds to me as though you have just
17 overruled my objection.

18 CHAIRMAN HILL: I have overruled your
19 objection, but I have noted it.

20 MR. THOMAS: Thank you. Thank you.
21 In light of you overruling that objection and in order
22 to preserve time, I will -- I will say that in the
23 interest of time, we will take up issues where the two
24 witnesses overlap through cross-examination of
25 Mr. Neinast and I will conclude my cross-examination.

1 Q. Was that testimony prepared by you or
2 under your direction?

3 A. Yes, it was.

4 Q. Do you have any corrections to the
5 testimony at this time?

6 A. No, I don't.

7 Q. Does your testimony include a corrected
8 version of, I believe it was, Exhibit MN-3 with your
9 direct testimony?

10 A. Yes, it was. I had a label correction
11 that I needed to make.

12 Q. If I were to ask you the same questions
13 set forth in your direct and rebuttal testimony
14 today, would you give the same answers?

15 A. Yes, I would.

16 MR. COVEY: Your Honor, I would move
17 the admission of the testimony of Mr. Neinast and make
18 him available to issue his opening statement.

19 CHAIRMAN HILL: Without an objection.

20 MR. MCCOLLOUGH: There is an
21 objection. I suspect it is going to sound very much
22 like what counsel before me did with Mr. McPhee. We
23 do, for the record, request an opportunity to take voir
24 dire to test the basis for this witness's opinions.

25 I would characterize much of this

1 testimony not only as legal in nature, but also as an
2 expert who is expressing opinions, who has conducted a
3 study. And before testimony on his study results can
4 be admitted, we have a right, under the law which has
5 been adopted in this state, to test its reliability.

6 This is in the nature of a Daubert
7 test. Before expert opinions using studies of this
8 type can be admitted into evidence, there must be a
9 finding that it is of a reliable nature and was
10 performed using proper scientific or other analytical
11 methods. I wish to conduct some voir dire to get into
12 that before this is admitted.

13 CHAIRMAN HILL: Counsel?

14 MS. PHILLIPS: Thank you, Chairman
15 Hill. AT&T disagrees that that is a proper
16 characterization of this witness's testimony. This
17 witness is offering fact evidence. This witness did
18 not do any DNA testing. Okay? We are not talking
19 about somebody who has performed scientific
20 experiments.

21 The data that Mr. Neinast is going to
22 talk about, what is called in his testimony "a call
23 study" is basically this, we looked -- AT&T collected a
24 list of all the telephone calls that Halo sent during a
25 week. We didn't use logarithms or mathematical

1 analysis is silly and not at all consistent with the
2 way this commission treats evidence of this nature. So
3 we disagree, obviously.

4 MR. MCCOLLOUGH: If I may respond. I
5 promise to be really quick. In essence, what
6 Mr. Neinast is bringing to you is some kind of
7 forensics analysis. He studied information, picked a
8 certain period, looked at the information from that
9 period, and formed conclusions and an opinion which he
10 is presenting to you. One specific instance is his
11 estimate that 74 percent of the traffic is
12 landline-originated. Now, in order to calculate that
13 percent, he had to perform an analysis and a study.
14 I'm sorry. Where I come from, that's an expert
15 opinion.

16 CHAIRMAN HILL: You are from Texas,
17 aren't you?

18 MR. MCCOLLOUGH: I am indeed, and in
19 Texas we pronounce it VORE-DIRE, not VWA-DEER. I don't
20 want to waste a bunch of time here, because I suspect I
21 know what the ruling is. We do request the opportunity
22 for voir dire, and you're either going to give it to me
23 or you're not.

24 CHAIRMAN HILL: Voir dire or garde or
25 whatever you want to call it, no, we're not going to

1 give it to you.

2 MR. MCCOLLOUGH: Thank you.

3 CHAIRMAN HILL: We're going to operate
4 as we normally do within the TRA function, and I don't
5 think it rises to that issue at this point.

6 (Prefiled testimony moved
7 into the record.)

8 CHAIRMAN HILL: All right. Continue.

9 MR. COVEY: Thank you.

10 BY MR. COVEY:

11 Q. Mr. Neinast, have you prepared a summary
12 of your testimony that you would like to present at
13 this time?

14 A. Yes, I have.

15 Q. Thank you.

16 A. Good morning. I'm Mark Neinast,
17 associate director of network regulatory. I have
18 over 36 years with AT&T, primarily in the network
19 organization. I'm here to discuss the network and
20 technical facts in this case.

21 Halo has entered into a wireless
22 interconnection agreement with AT&T here in Tennessee.
23 Halo's ICA clearly prohibits from sending AT&T landline
24 traffic. I discuss in my testimony how Halo has
25 actually been sending landline traffic to AT&T in

1 going to -- I'm not here to testify about that.

2 Q. So you don't know --

3 A. No.

4 Q. -- that, for example, if we assume that
5 this Bandwidth.com number that was in your list --
6 that this particular call actually touched
7 Bandwidth.com's network when it was originated?

8 A. I'm not here to represent that. I'm
9 here to represent the fact that they're listed in
10 the LERG, local exchange routing guide, as a
11 landline carrier, and that's what they're listed as
12 and that's the way we treat them. That's the
13 industry practice today.

14 Q. Your study, however, would have assumed
15 that it did indeed originate on Bandwidth.com's
16 network?

17 A. If they list themselves as a landline
18 carrier, Bandwidth.com, then that's how we're going
19 to treat them, and that's the industry practice
20 that's being used today by all local exchange
21 carriers.

22 MR. MCCOLLOUGH: I'm going to rise
23 just to make a record. I move to exclude his testimony
24 because his study is unreliable. He used the calling
25 and called number and then derived from that the

1 inference or assumption that merely because an
2 originating number was signaled, that it originated on
3 the carrier's network that holds that number and that
4 it is the type of call that is denoted in the LERG,
5 i.e., wireline or wireless.

6 I have demonstrated in this room today
7 that that is not a valid assumption. That renders his
8 study invalid, without basis, and inadmissible. I move
9 to strike.

10 MS. PHILLIPS: Obviously, AT&T opposes
11 the motion to strike. Mr. McCollough can make his
12 argument about his view of how reliable our process
13 was, but it's been explained here, and I think the
14 Authority can weigh that as the Authority thinks is
15 appropriate. But it certainly doesn't go to the
16 admissibility of this evidence. This evidence has been
17 explained. It is of the type and character that we
18 routinely rely on in this commission to talk about what
19 happened with a bunch of telephone calls.

20 CHAIRMAN HILL: One question of the
21 witness. The study that you did and the way that it
22 was done, getting the information and all that, and the
23 results that you had from the study, is that industry
24 standard -- and I don't mean AT&T only, but industry
25 standard to do the study the way you did it and to come

1 a lot of things I've got questions about, but we're not
2 here to talk about those things today.

3 I overrule your objection, but well
4 stated, nonetheless. Anything else?

5 MR. MCCOLLOUGH: Yes, sir.

6 BY MR. MCCOLLOUGH:

7 Q. You said today -- you said in your
8 rebuttal testimony, page 6, 11 -- lines 11 through
9 12, that the industry treats IP-originated traffic
10 as wireline. May I take from that then that your
11 analysis would have included all IP-originated calls
12 and characterized them as wireline-originated?

13 A. Yes.

14 Q. Okay. Now, AT&T has an affiliate,
15 AT&T wireless; correct?

16 A. Yes.

17 Q. And AT&T wireless is building a
18 next-generation wireless network. It's 4G LTE;
19 right?

20 A. Yes.

21 Q. That's an IP-based network, isn't it?

22 A. Yes, it is.

23 Q. And, in fact, the voice piece of it runs
24 on the data side. They actually have a session
25 initiation protocol-type application baked into the

1 MS. PHILLIPS: Put it in as an
2 exhibit. He can't testify about it.

3 CHAIRMAN HILL: Without objection,
4 Exhibit 10 will be in the record.

5 (Marked Exhibit 10.)

6 MR. MCCOLLOUGH: That concludes my
7 cross-examination.

8 CHAIRMAN HILL: We are going to take a
9 5-minute break or so and let everybody get a little
10 refreshed and then come back and we'll hit the next
11 side. The witness is excused. Thank you very much.

12 (Recess taken from 3:08 p.m.
13 to 3:19 p.m.)

14 CHAIRMAN HILL: We're back in session
15 again. Ms. Phillips, did you have any redirect?

16 MS. PHILLIPS: No, sir, we don't.

17 CHAIRMAN HILL: And you wanted to move
18 the testimony of Mr. Neinast into the record; is that
19 correct?

20 MS. PHILLIPS: I believe we moved it
21 earlier and there was an objection, and we just weren't
22 absolutely sure, even though the objection was
23 overruled, that it actually got accepted into the
24 record.

25 CHAIRMAN HILL: It's moved into the

1 record, without objection.

2 MS. PHILLIPS: Thank you.

3 (Prefiled testimony entered
4 into record.)

5 CHAIRMAN HILL: And there's no direct
6 from you?

7 MS. PHILLIPS: No.

8 CHAIRMAN HILL: Do the directors have
9 any questions for the witness, if we do, we'll call him
10 back to the stand?

11 DIRECTOR FREEMAN: No.

12 CHAIRMAN HILL: Do the staff members
13 have any questions?

14 MS. STONE: No.

15 CHAIRMAN HILL: You get off easy. I
16 don't know if that's true or not, but at least you
17 don't have to answer any more questions. How's that?

18 Mr. Thomas, are you the lead on this
19 one?

20 MR. THOMAS: No, Your Honor. I just
21 wanted to clarify that we did object to the entry of
22 the testimony, and you have overruled our objection?

23 CHAIRMAN HILL: That's the way it
24 worked. All right. Well --

25 MR. THOMAS: Thank you.

SOUTH CAROLINA PUBLIC SERVICE COMMISSION

HEARING OFFICER DIRECTIVE

DOCKET NO. 2011-304-C

APRIL 11, 2012

Hearing Officer: David Butler

DOCKET DESCRIPTION:

Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Incorporated for Breach of the Parties' Interconnection Agreement

MATTER UNDER CONSIDERATION:

Halo's Objections to and Motions to Strike the Direct and Rebuttal Testimonies, respectively, of AT&T witnesses Mark Neinast and J. Scott McPhee, and the Rebuttal Testimony of AT&T witness Raymond W. Drause

HEARING OFFICER ACTION:

Halo's objections are overruled and its Motions to Strike are all denied. Both Halo's objections and its Motions are conclusory, and, for the most part, fail to explain how any of the conclusions stated apply to any particular aspects of the testimonies. When specific portions of the testimony are noted, Halo asserts that the testimonies are defective, based on a number of general grounds, and that the testimonies should therefore be automatically excluded before they are even presented to the Commission. Such objections go to the weight, rather than the admissibility of the evidence. All parties will have full cross-examination rights of all witnesses presented, thereby allowing the Commission to fully weigh the merits of the evidence. However, Halo has not related any specific principle of law that would dictate exclusion of any of the witnesses' testimony. Again, all objections are hereby overruled, and all Motions to Strike are denied.

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

Complaint of TDS TELECOM on)
behalf of its subsidiaries)
BLUE RIDGE TELEPHONE COMPANY;) Docket No. 34219
CAMDEN TELEPHONE & TELEGRAPH,)
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)

Hearing Room
244 Washington Street
Atlanta, Georgia

Wednesday, April 25, 2012

The above-entitled matter came on for hearing
pursuant to notice at 10:01 a.m.

BEFORE:

TIM G. ECHOLS, Chairman
CHUCK EATON, Vice Chairman
H. DOUG EVERETT, Commissioner

1 CHAIRMAN ECHOLS: Thank you.

2 All right, let's get a couple of housekeeping
3 matters behind us.

4 The parties have consented to making an opening
5 statement. I'm going to allow each party -- you think five
6 minutes would be enough for an opening statement?

7 (No response.)

8 CHAIRMAN ECHOLS: You all okay with that?

9 (No response.)

10 CHAIRMAN ECHOLS: If there's no objection, we're
11 going to proceed how we've traditionally done it here in
12 telecom cases, we're going to have each witness present
13 their direct and their rebuttal testimony simultaneously, if
14 there's no objection.

15 MS. DAVIS: No.

16 CHAIRMAN ECHOLS: So please have your witnesses
17 prepared to present their direct and rebuttal testimony when
18 they take the stand and be prepared to cross each witness on
19 their direct and rebuttal testimony. Great.

20 Are there any public witnesses today?

21 (No response.)

22 CHAIRMAN ECHOLS: Okay. There are also a number
23 of motions to strike testimony that were filed by Halo and
24 Transcom and we're going to address those motions at this
25 time.

1 Mr. Mew.

2 MR. MEW: Mr. Chairman, with the panel's
3 indulgence, Troy Majoue will address those.

4 CHAIRMAN ECHOLS: Mr. Majoue.

5 MR. MAJOUÉ: We'll be brief on the motions, and as
6 you can see, the motions themselves are fairly brief.

7 As a preliminary matter, we just note that in
8 every one of the pieces of testimony that's been offered,
9 there are multiple areas that constitute legal conclusions
10 which these witnesses are not entitled to make. And that in
11 addition to that, they purport to make factual assertions
12 about the way Halo and Transcom work, including internal
13 workings and things of that nature, which they have no
14 personal knowledge. It's something that in other
15 proceedings where they've offered comparable testimony,
16 they've acknowledged they don't actually have personal
17 knowledge, it's based on third hand sources; in other words,
18 hearsay type evidence.

19 And so as a preliminary matter, we ask that to the
20 extent any of these items constitute testimony for which
21 they have no personal knowledge or which constitutes legal
22 conclusions which they're not qualified to make, that that
23 be stricken or at the very least that the Commission give it
24 the weight it's accorded, which is they're not legal experts
25 and they're not entitled to give testimony that approaches

1 those issues.

2 And similarly, to the extent that there are some
3 expert witnesses, we assert that those expert witnesses have
4 not followed all of the standards for maintaining any
5 appearance of reliability in their expert opinion. In
6 particular, they have not asserted any methodology which is
7 reliable or even really explained why their assumptions are
8 valid or what methodology provides any basis for their
9 opinion. And based on that, the expert testimony, we
10 submit, should also be stricken on those grounds.

11 Thank you.

12 CHAIRMAN ECHOLS: Thank you.

13 AT&T.

14 MS. DAVIS: Mr. Covey will argue our motion.

15 CHAIRMAN ECHOLS: Mr. Covey.

16 MR. COVEY: Good morning.

17 Halo made similar motions to strike and similar
18 arguments in prior proceedings, and Tennessee, Wisconsin,
19 South Carolina, all three of those commissions denied those
20 motions with good reason for doing so.

21 The argument on legal conclusions, first of all,
22 is very disingenuous if you read Halo's testimony which is,
23 in effect, a legal brief. But in any event, the AT&T
24 testimony talks about legal principles every once in awhile,
25 as is common in Commission proceedings to give a context for

1 what they're talking about, so people will have some idea
2 what the issues are and what will ultimately have to be
3 decided.

4 As far as the foundation objections, the AT&T
5 witnesses present testimony based on their personal
6 familiarity with the facts as they explain in their
7 testimony, based on their experience in the industry which
8 they also explain in their testimony. This too is very
9 common type of testimony in regulatory proceedings and
10 there's no basis to strike it.

11 That's all I have.

12 CHAIRMAN ECHOLS: Mr. Walsh, I'd like to hear from
13 you -- oh, I'm sorry, Mr. Galloway -- sorry about that.

14 MR. GALLOWAY: Mr. Chairman, on behalf of TDS, let
15 me say this is the first time I've ever defended a motion to
16 strike testimony in its entirety, and while that might be a
17 real good way to shorten the hearing, the motion needs to be
18 denied. I suspect the purpose of the motion is really to
19 set up an issue potentially on appeal.

20 Halo and Transcom object to the entirety of Mr.
21 Drause's testimony -- I'm going to use him as an example, it
22 applies every place for the other witnesses -- stating that
23 instead of giving fact testimony, he's giving conclusions of
24 law. Mr. Drause, as do the other witnesses, testifies about
25 the technology configuration that Halo uses. He testifies

1 that Halo developed essentially a technological gizmo to be
2 able to call these calls wireless. And you can look through
3 his testimony and look through his descriptions of the
4 technology involved, and you can see that that is in fact
5 going to the technology, not to a legal argument.

6 The allegation is that Mr Drause fails to lay a
7 foundation on his personal testimony -- personal knowledge.

8 All the witnesses in this case are people who have had
9 multiple years of experience in telecom, these are highly
10 technical issues and these people all have experience on
11 those issues. And you may determine that each witness is
12 credible or one witness is credible and another is not, but
13 that goes to how you weigh the testimony, not its
14 admissibility.

15 And I would note and reiterate what Mr. Covey
16 said, throughout, for example, Mr. Wiseman's testimony, it
17 is replete with legal argument about what -- and statements
18 about what this case means or that case means or what they
19 were advised by counsel. So I agree with him that it is
20 disingenuous to criticize this testimony on behalf of TDS
21 when theirs has the same infirmity.

22 Y'all have always had cases up here where people
23 sit on the stand and say "I'm not a lawyer, but my
24 interpretation is," you've always allowed that and then you
25 have assessed its credibility in your capacity as the fact-

1 finder and the adjudicator of the case.

2 So we would ask that the motion to strike be
3 denied. Thank you.

4 CHAIRMAN ECHOLS: Mr. Walsh.

5 MR. WALSH: Mr. Chairman, the staff would
6 recommend that the Commission deny the motions to strike. I
7 think the reasons for denying have been set out pretty much
8 by TDS and AT&T counsel. The motions to strike say, on
9 pretty much all of them I think except for one, it mentions
10 specifically that Halo and Transcom object to the expert
11 testimony as to the rating and billing of traffic, which
12 testimony purports to be based on the premise that telephone
13 numbers are appropriate and reliable determinants for call
14 rating and billing and it says that such testimony is not
15 based on reliable principles and methods.

16 Transcom and Halo will have a full opportunity to
17 cross examine the witnesses on how reliable a method that is
18 and the Commission can take that under its advisement as
19 well as the credibility of the rest of the testimony. We do
20 believe that the experience of the witnesses in this
21 proceeding allow them to testify as experts on the subject
22 matter in their testimony.

23 CHAIRMAN ECHOLS: Okay. Commissioners, if there's
24 no objection, I'm going to deny the motions.

25 (No response.)



ILLINOIS COMMERCE COMMISSION

June 1, 2012

Illinois Bell Telephone Company	:	
-vs	:	
Halo Wireless, Inc.	:	
	:	12-0182
Complaint as to Violations of an	:	
Interconnection Agreement entered	:	SERVED ELECTRONICALLY
into under 47 U.S.C. §§ 251 and 252	:	
and pursuant to Section 10-0108 of	:	
the Public Utilities Act.	:	

NOTICE OF ADMINISTRATIVE LAW JUDGE'S RULING

TO ALL PARTIES OF INTEREST:

Notice is hereby given that the Administrative Law Judge has overruled Halo Wireless, Inc.'s "Objections to Direct Testimony of J. Scott McPhee" and "Objections to Direct testimony of Mark Neinast" filed on May 15, 2012.

Sincerely,

Elizabeth A. Rolando
Chief Clerk

EAR:ikb
Administrative Law Judge Von Qualen

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Halo Wireless, Inc.,)
)
Complainant,)
)
v.)
)
Craw-Kan Telephone Cooperative, Inc.,)
Ellington Telephone Company,)
Goodman Telephone Company,)
Granby Telephone Company,)
Iamo Telephone Company,)
Le-Ru Telephone Company,)
McDonald County Telephone Company,)
Miller Telephone Company,)
Ozark Telephone Company,)
Rock Port Telephone Company,)
Seneca Telephone Company,)
Alma Communications Company, d/b/a Alma Telephone Company,)
Choctaw Telephone Company;)
MoKan Dial, Inc.,)
Peace Valley Telephone Company, Inc.,)
)
and,)
)
Southwestern Bell Telephone Company, d/b/a AT&T Missouri)
)
Respondents.)

File No: TC-2012-0331

**ORDER REGARDING OBJECTIONS TO PRE-FILED TESTIMONY AND
MOTIONS TO STRIKE**

Issue Date: July 9, 2012

Effective date: July 9, 2012

Background

On June 25, 2012, one day before the start of the evidentiary hearing, Halo Wireless, Inc. filed voluminous objections to the prefiled testimony of all of the other parties' witnesses. Halo also filed motions to strike substantial portions of this same

prefiled testimony. More specifically, these objections and motions were filed with regard to the following prefiled testimony:

AT&T Missouri's Witnesses

Rebuttal Testimony of Raymond W. Drause (EFIS Docket Entry No. 141),¹

Direct & Rebuttal Testimony of J. Scott Mcphee (EFIS 159 & 142 respectively),

Direct & Rebuttal Testimony of Mark Neinast (EFIS 162 & 144 respectively),

Craw-Kan, et al.'s Witnesses²

Direct Testimony of Rick Bradley (EFIS 147),

Direct Testimony of Debbie Choate (EFIS 148),

Direct Testimony of Robert Hart (EFIS 152),

Direct Testimony of Kevin L. Johnson (EFIS 154),

Direct Testimony of Jack Jones (EFIS 155),

Direct Testimony of Dee M. McCormack(EFIS 158),

Direct Testimony of W. Jay Mitchell (EFIS 160),

Direct Testimony of Benjamin Jack Rickett (EFIS 163),

Direct Testimony of Craig R. Wilbert (EFIS 164),

Alma, et al.'s Witnesses³

Direct Testimony of Tommie Sue Loges (EFIS 156),

Direct Testimony of Amanda Molina (EFIS 161),

¹ EFIS is the Commission's Electronic Information and Filing System.

² The Craw-Kan Respondents are: Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Goodman Telephone Company, Granby Telephone Company, Iamo Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, and Peace Valley Telephone Company, Inc.

³ The Alma Respondents include: Alma Communications Company d/b/a Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial, Inc.

Staff's Witness

Rebuttal Testimony of William L. Voight (EFIS 146).

The objections were directed at specific lines and sections of testimony. Consequently, at the evidentiary hearing, the prefiled testimony of these witnesses was offered for admission, subject to a reserved ruling by the Regulatory Law Judge ("RLJ"). The RLJ set a deadline of July 6, 2012 for written responses to the objections and motions to strike.

The Objections

While the Commission has reviewed and considered all of Halo's objections and motions to strike in detail, the Commission will not repeat every single objection raised by Halo in relation to each and every witness by line and page number in this order. The filings speak for themselves. Rather, for purposes of this order the Commission will outline the general character of the objections and the responses for analysis and decision. There are also variations in the objections from witness to witness, and while the Commission is attempting to summarize the objections, it does not mean to imply that every objection listed in the categories below applied to each and every witness in that category.

With regard to AT&T Missouri's Witnesses:

Halo raises objections that portions of AT&T Missouri's witnesses' testimony: (1) is self-serving, speculative in nature and demonstrably untrue; (2) that the opinions offered lack sufficient foundation and underlying data; (3) that the testimony is not based on reliable principles and methodology, reliable foundational assumption and data, or reliable reasoning; (4) that the data relied upon for these opinions is not of the type that is reasonably relied upon by experts in the appropriate field; (5) that some

statements are legal conclusions, and (6) that documentary evidence offered by these witnesses is subject to the parol evidence rule and cannot be interpreted by these witnesses. Halo further asserts that there is insufficient foundation, in some instances, to establish that AT&T's witnesses are experts for certain opinions they have advanced.

With regard to *Craw-Kan, et al.'s Witnesses* and *Alma, et al.'s Witnesses*:

Halo raises objections that portions of these witnesses' statements : (1) lack foundation to the extent they are offered as factual testimony as to whether Halo terminates traffic, the amount of such traffic, or the nature of such traffic; (2) that the opinions offered lack sufficient foundation and underlying data; (3) that the testimony is not based on reliable principles and methodology, reliable foundational assumption and data, or reliable reasoning; (4) that the data relied upon for these opinions is not of the type that is reasonably relied upon by experts in the appropriate field; (5) that any statements related to AT&T Missouri's traffic study should be excluded for failure to lay foundation that the study is admissible hearsay or expert work product and that objections 2 through 4 above also apply; and (6) that any documentary evidence offered by these witnesses is the best evidence of their contents and cannot be interpreted by these witnesses.

Halo further objects to portions of the testimony to the extent it purports to offer any alleged facts, opinions, or conclusions regarding any of the counterclaims asserted by AT&T Missouri against Halo relating to the alleged breach of the Interconnection Agreement ("ICA") between Halo and AT&T Missouri. Halo claims that any such testimony is neither relevant nor probative because it is being offered on behalf of a party who is a stranger to the ICA and has no actual knowledge or standing to offer testimony regarding AT&T's Missouri's claims.

With regard to Staff's Witness:

Halo raises objections that portions of Mr. Voight's testimony: (1) constitute legal conclusions that he is not qualified to provide; (2) lack foundation establishing its reliability; and (3) are based on inadmissible hearsay. Halo further claims that certain documents referenced by Mr. Voight are the best evidence of their terms, and the parol evidence rule bars the Staff from seeking to controvert them. Finally, Halo asserts that "Transcom" as referenced by Mr. Voight is not the same entity as "Transcom" is today and that no foundation exists for Mr. Voight's testimony in relation to this entity.

The Responses

On July 6, 2012, Commission's Staff, the Alma Respondents, AT&T Missouri, and the Craw-Kan Respondents (collectively "Respondents") filed their responses.⁴ Similar to Halo's objections and motions, the Commission will not repeat every response to every single objection raised by Halo. The Commission, upon an impartial and independent examination of the objections and responses, finds and concludes that the responses are complete, cogent and legally correct. Therefore, the Commission will incorporate the legal analyses of the Respondents into this order, by reference, as if fully set forth therein.

Analysis and Decision

It is well settled law that "the burden is on the party who objects to the admission of evidence to state the proper ground for exclusion," and "[w]here the proper objection is not made the trial court cannot be convicted of error in overruling the objection."⁵ Halo carries the burden of identifying proper grounds for excluding the testimony to

⁴ EFIS Docket Entry Numbers 202, 203, 207, 209, respectively.

⁵ *In re King's Estate*, 572 S.W.2d 200, 204 (Mo. App. 1978).

which it has objected and moved to strike. Having concluded that the Respondents' legal analyses are correct in opposition to Halo's objections and motions to strike, Halo has failed to meet this burden. While the Commission will not address Halo's meritless objections line-by-line, the Commission will make several general observations about Halo's objections.

First, with perhaps the exception of the foundational and hearsay objections, which totally lack support, virtually all of Halos' objections relate to the credibility of the witnesses and the weight and validity of the evidence; not to admissibility. Halo was given a full opportunity to cross-examine all of the Respondents' witnesses and the Commission is fully capable of determining the credibility of those witnesses and the weight and validity to be accorded to the evidence offered by those witnesses – indeed, that is the Commission's role, not Halo's.

Similarly, Halo's many assertions that the objected-to testimony was "self-serving," "speculative," "demonstrably untrue," not the "best evidence" of the facts, or not based upon "reliable principles and methodology" are not decisions that belong to Halo. The Commission is the fact-finder, not Halo.

Additionally, the Commission notes that Halo's objections claiming that certain witnesses were incompetent to testify as to whether Halo is terminating traffic with their respective companies is absurd. While the type and amount of traffic may be in dispute, the fact that Halo has filed this complaint to prevent the blocking of its traffic being terminated with these companies constitutes a judicial admission that it is terminating traffic with these companies.

Halo's objections will be overruled. Halo's motions to strike will be denied.

THE COMMISSION ORDERS THAT:

1. The responses filed by the Commission's Staff, the Alma Respondents, AT&T Missouri, and the Craw-Kan Respondents on July 6, 2012 are incorporated into this order, as if fully set forth therein.
2. Halo Wireless, Inc.'s objections to the pre-filed testimony delineated in this order are overruled.
3. Halo Wireless, Inc.'s motions to strike portions of the pre-filed testimony delineated in this order are denied.
4. All of the prefiled testimony subject to the reserved ruling by the RLJ on Halo's objections and motions are hereby admitted and received into the evidentiary record.
5. This order is effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Harold Stearley, Deputy Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 9th day of July, 2012.

**DOCKET NO. U-32237 - BELLSOUTH TELECOMMUNICATIONS LLC D/B/A AT&T
LOUISIANA VERSUS 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.**

DATE OF HEARING: June 7, 2012

ADMINISTRATIVE LAW JUDGE CAROLYN DEVITIS

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1 **DOCKET NO. U-32237 - BELLSOUTH TELECOMMUNICATIONS LLC**
2 **D/B/A AT&T LOUISIANA VERSUS HALO WIRELESS, INC. IN RE:**
3 **PETITION OF BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A**
4 **AT&T LOUISIANA SEEKING RELIEF FROM BREACHES OF**
5 **INTERCONNECTION AGREEMENT WITH HALO WIRELESS, INC.**

6 **ADMINISTRATIVE LAW JUDGE CAROLYN DEVITIS:** Welcome to
7 Hearing in Docket U-32237. This is Bellsouth Telecommunications LLC d/b/a
8 AT&T Louisiana versus Halo Wireless incorporated. It is in regard to a Petition
9 of BellSouth Telecommunications, LLC d/b/a AT&T Louisiana Seeking Relief
10 from Breaches of Interconnection Agreement with Halo Wireless. Would you
11 please make your appearances for the record?

12 **MR. MICHAEL KARNO:** Good morning Your Honor, Michael Karno on
13 behalf of AT&T Louisiana. I am here with Dennis Friedman from the Mayer
14 Brown Law Firm, who is also representing AT&T in this matter.

15 **MR. BRANDON FREY:** Good morning Your Honor, Brandon Frey on behalf
16 of the Commission Staff, and I have with me Jeff Valliere.

17 **MR. PAUL GUARISCO:** Good morning, Paul Guarisco with Phelps Dunbar,
18 on behalf of the Small Company Committee of the Louisiana
19 Telecommunications Association.

20 **MS. JANET BOLES:** Janet Boles on behalf of the Small Company Committee.

21 **MR. TROY MAJOUÉ:** Good morning Your Honor, Troy Majoué on behalf of
22 Halo Wireless, Inc., and I have with me Scott McCullough, also for Halo
23 Wireless, Inc.

1 **JUDGE DEVITIS:** Okay, has everyone signed in? Do we have any preliminary
2 matters before we begin today? Want to thank Mr. Guarisco for forwarding us a
3 pre-hearing statement listing the order of witnesses.

4 **MR. KARNO:** Your Honor, this is Michael Karno. There is one outstanding
5 motion; I believe that was filed on behalf of Halo, with respect to a motion to
6 strike AT&T's testimony for Neinast, McPhee, and Drause and we filed
7 yesterday, in the record. It was the original motion, filed by Halo, was on the
8 first, I believe, when we filed our motion in response to that opposition and
9 objection, yesterday.

10 **JUDGE DEVITIS:** Okay, so are you suggesting we take that up first then?

11 **MR. KARNO:** If you would like.

12 **JUDGE DEVITIS:** I think that makes sense. Can't have received the filings.
13 We can allow a brief time for oral argument - not too long, because we need to get
14 on with the Hearing, but I would like to hear first from Halo as regards the
15 objections.

16 **MR. TROY MAJOUÉ:** Your Honor, I won't go too far into the objections, but
17 the short of it is, that is for every line and area of testimony that we have
18 identified in our motions, we identify a number of objections that essentially
19 apply across the board, that these witnesses don't have personal foundation or
20 knowledge to testify to the things about which they are testifying. For example,
21 there are a number of items which they testify about the inner workings of Halo or
22 what Halo does, or doesn't do; what Halo knows, or doesn't know; what kind of
23 numbers and things it receives, or does not receive; and on its face, they simply
24 don't have that knowledge and if they did, or somehow acquired it, they haven't

1 shown how they have gotten it. So for every area where we have identified that,
2 we request that that testimony not be allowed, or at the very least they be required
3 to show what foundation they have. And if they don't, or it is based on some type
4 of belief or other document, that they be required to show that to make the record
5 clear, because they have asserted a number of things that -- as fact, when in fact
6 they have no foundation or knowledge of it. There are a number of other areas
7 that we have identified in our motions, in particular, that go to areas where they
8 make legal conclusions and I understand that in these type of proceedings that is
9 the case that a lot of times the Commission will require the witnesses with
10 industry-experience to make some type of conclusion, or at least relate some type
11 of context to the best of their knowledge and experience. But in this regard, they
12 are all making legal conclusions about the ultimate issues of law in this case. And
13 asserting things that we claim, just aren't true, aren't the law. And so, we have
14 objected to them primarily, to point out to the Commission that these are in fact
15 conclusions of law, even though they have been asserted as facts. And we point
16 that out so that the Commission, is inclined to keep that in there, keep that type of
17 testimony in there, can give the weight it is afforded, which is merely that of a
18 person who is claiming some context, and not as an actual fact. The final thing
19 that really goes to some of the more technical aspects, for example, Mr. Drause,
20 we have identified a number of areas -- we have identified a number of areas
21 where Mr. Drause and Mr. Neinast purport to perform some type of study or
22 analyses, without giving any demonstration of the reliability of those particular
23 analyses, or methodologies. And under the Louisiana rules of evidence, we
24 submit that those things are not probative, because they are not reliable under the

1 standards that Louisiana and the Commission uses. And so other than that, we
2 will leave it to the Commission and the ALJ on the remaining information that we
3 have in our pleadings. Essentially we identify all the lines that we have these
4 specific issues to.

5 **JUDGE DEVITIS:** Mr. Karno.

6 **MR. KARNO:** Yes ma'am. It is a bit disingenuous as the objections -- since it --
7 their testimony is similar to what AT&T's testimony has filed. And AT&T has
8 filed several rounds of testimony in several different dockets in the State of
9 Louisiana, and in front of the Louisiana Public Service Commission, very similar
10 to this type of testimony, or comments. Rule 32 allows it under the LPSC rules
11 and we easily meet the test that it is probative and relevant in this case. We have
12 witnesses that have a long history of employment with AT&T, as well as an
13 outside engineer. If the -- if Halo believes that they are not credible, or that they
14 lack foundation, I can obviously cross-examine these witnesses today, to pull
15 those type of issues out. Five states have already ruled on this same objection,
16 and denied it. So this is typical of a regulatory hearing, the type of testimony that
17 AT&T filed, and we believe you should deny the motion.

18 **MR. MAJOUÉ:** Your Honor, our only response to the claim that we are being
19 disingenuous by objecting to these things. I think we have pointed out that
20 although we recognize and including our witnesses do have to make some
21 contextual type statements that in their instance, for the areas we have identified
22 in our motion, that they make a number of statements that purport to be questions
23 of fact, but are in fact questions of law to which, I mean, that is the Commission's
24 role. And on the other side of that, AT&T has not filed any objections to our

1 testimony, so whether they claim ours has comparable issues is not relevant to our
2 actual motion, but all of that aside, again, we just point this out to the Commission
3 so that at the very least it can give this testimony the weight it is afforded because
4 of the fact that it is not all based on personal knowledge. It hasn't been shown to
5 have all of the elements of reliability that courts and Commissions in Louisiana
6 typically rely on. And so again, for the reasons we set forth in our motion, we ask
7 that these areas of testimony be stricken, or at the very least, given the weight
8 they are afforded, considering their issues.

9 **JUDGE DEVITIS:** Thank you. I am going, at this point in time, to deny Halo's
10 objections. I believe there is some merit to comments about the extent of legal
11 preclusions offered. I do agree with AT&T's assessment of that matter as far as
12 pointing out that it is not un-frequently the case in hearings before regulatory
13 commissions that references are made to the laws, the case law, regulations. I
14 would suggest to the parties though, that they could try a little bit harder to phrase
15 it in terms such as, after their witness has explained they are not a lawyer, that
16 they are giving their understanding, or words to this effect. These types of
17 hearings often are based on an analysis of the laws, the contracts, the cases. And I
18 do have competent lawyers to argue the law, to make -- while AT&T has not filed
19 and objection or motion to strike against Halo's testimony, I found that there was
20 also in that case, extensive references to legal matters. So I think the wiser way to
21 deal with that issue is probably to remain cognizant of what it is, what its place is,
22 and the proper weight to be attributed to it, without trying to hack up the
23 testimony by taking out individual pieces of it. I had a couple of other points I
24 wanted to bring up after reading the filings and one of which was a statement by

1 Halo, requesting that any data or other information underlying the testimony not
2 previously provided, be produced. This seems kind of extraordinary, so maybe I
3 am not understanding what the basis of this request is. I mean, we have finished
4 discovery at this point. And we have had pre-filed testimonies, so nobody should
5 be surprised about anything. Perhaps you could illuminate that a little bit more.

6 **MR. MAJOUÉ:** Well, surely, the nature of that objection is simply that in
7 connection with discovery, or in connection with the regular rules of evidence, we
8 are entitled to whatever data or information their experts have relied upon. And I
9 believe since the filing, or around the time of the filing, we have received some
10 information from them. But still have not received all of the information upon
11 which they base these studies. And for that reason, we don't have and neither
12 does the Commission have, all of the information it needs to determine for sure,
13 whether these analyses are valid, or based on reliable methods.

14 **JUDGE DEVITIS:** Mr. Karno, can you provide us any information on this?

15 **MR. KARNO:** The witnesses for which we provided the responses with the
16 analyses, on the call records and detail and amounts, the witnesses are present
17 today. So to the extent that there are questions about the analysis and the data
18 records that we provided either in testimony, or in discovery, which I believe was
19 sufficient in our response, can be asked about on the record. But we have
20 provided everything that we probably need to provide at this point.

21 **JUDGE DEVITIS:** So, am I understanding correctly, then? This is more in the
22 nature of wanting to be free to request things that come up in the examination?

23 **MR. MAJOUÉ:** Well, it was primarily as a preliminary matter, prior to the
24 examination, to be able to examine whatever pieces of data or standards that they

1 used to make the assumptions that they did and so, all of that data upon which
2 they rely. And so under the general rules of evidence that these experts are
3 relying on this information, or relying on standards, or have source data, we are
4 entitled to see that, and again, I believe Mr. Karno is correct in that we have
5 received some, but not all of this information. And we do recognize that the
6 witnesses are here and can answer some questions and we merely pointed out to
7 the Commission that to the extent that this Commission doesn't have all of that,
8 then we don't have all of the information we need to make these determinations
9 on the reliability of these studies.

10 **MR. DENNIS FREIDMAN:** Your Honor, if I may, Dennis Freidman, for
11 AT&T, Louisiana. To put this in context and maybe take this issue off the table
12 and I hope I am understanding Your Honor's question. The sequence has been
13 that Halo did serve AT&T, Louisiana, with some discovery requests. AT&T
14 appropriately responded. Its responses included the production of some
15 information and included some objections. That is where matters stand. There
16 has been no motion to compel, filed by Halo; and I don't recall the exact timing of
17 the sequence, but if there was not sufficient -- if Halo wanted to file a motion to
18 compel and did not do so because of the press of time, that would be because of
19 the timing of Halo's initial request. So I believe that the way we are situated
20 today, frankly, Your Honor is that we do not have an issue about this. We have
21 had discovery, Halo may, or may not be entirely satisfied with what it has
22 received. We think it should be satisfied, but we don't think that there is a live
23 issue before the court, at this time, before Your Honor at this time, having to do
24 with these discovery matters.

1 **MR. MAJOUÉ:** Your Honor, if I could just point to a Louisiana Rule of
2 Evidence, particular Louisiana Rule or Article 705, in which it says that “Any
3 civil case, the expert may testify in terms of opinion or inference and give his
4 reasons therefore without prior disclosure of the underlying facts or data, unless
5 the court requires otherwise. The expert may, in any event, be required to
6 disclose the underlying facts, or data, on cross examination. So in terms of
7 timing, we are here on cross examination and what we haven’t been previously
8 provided, we request again, so this Commission can have the full understanding
9 and full data. And so again, we point it out not to make an overdrawn issue of it,
10 but to merely point out, “look, we don’t have all the data.” They are asserting a
11 lot of things as standards in the industry, without providing any basis that that is
12 the standard, that have a bunch of data, some of which we admit that we received,
13 but some of which we don’t have and so as we sit here today, about to do cross
14 examination, we just remind the Commission that “Hey, that is missing from the
15 record, under this rule of evidence, we can require it to be in, and it is simply not
16 in.” Yeah, and we want it here.

17 **JUDGE DEVITIS:** Okay, it seems then that it would be inappropriate to grant a
18 blanket-request for information. Discovery is complete; nothing has been filed as
19 far as requesting further information on the discovery. I think a lot of the issues
20 maybe can be resolved through cross examination as we go forward.

21 **MR. MAJOUÉ:** And Your Honor --

22 **JUDGE DEVITIS:** You know, without hearing what it is you are looking for, I
23 am unwilling to say “Blanket,” that it is impossible to get anything, but I am not
24 going to do a blank addition and have it anything else at this point in time.

1 **MR. MAJOUÉ:** Well and our hope is that, you know, potentially on cross
2 examination, that we can point out the information and data, because again, under
3 the new rule of evidence, we can on cross examination, request that. And I guess
4 we can point it out to the Commission and that is really our goal.

5 **JUDGE DEVITIS:** Thank you. I have a long series of objections filed, but the
6 objections read almost virtually the same from objection to objection. So I don't
7 really feel that it is needful to go through and look at all of the individual lines of
8 the statements. The statements, the objections seems to be primarily that the
9 testimony is self-serving, speculative in nature, demonstrably untrue, of limited
10 probative value and without foundation, or personal knowledge. But I don't have
11 any real analysis provided that this particular statement, how this statement is
12 prejudicial or how this statement is self-serving. You know, there is very little
13 basis to rule on the particular lines that the parties are complaining about. I
14 should also probably remark that as a regulatory agency, the Public Service
15 Commission does have somewhat more liberal rules of admissibility than do the
16 courts. Under the Commission's rule of practice and procedure for example, rule
17 32 provides that any evidence which would be admissible under the general
18 statutes of the State of Louisiana, or under the rules of evidence governing
19 proceedings in the matters not involving a trial by jury in the courts in the State of
20 Louisiana, shall be admissible before the Louisiana Public Service Commission.
21 Other evidence may be admitted by the Commission, if it is at all probative and
22 relevant, provided that the substantive rights of the parties are protected. Rules of
23 evidence shall be applied liberally in any proceeding, to the end that all needful
24 and proper evidence shall be conveniently, inexpressibly and speedily heard,

1 while preserving the substantive rights of the parties to the proceeding. So we do
2 have a little bit more flexibility as regards admissibility of the evidence. And I
3 think we need to bear that in mind when making a determination about precluding
4 receipt. And there were so many objections, as to so much of the testimony, that
5 we might have to start over, if we didn't have testimony on both sides that is
6 (INAUDIBLE), anyone might find an objection to raise. I think a lot of the
7 objections really can be treated and dealt with in terms of the validity and weight
8 to be given the evidence through the interchange in the parties and the cross
9 examination of the witnesses. Having just received recently, the motion and
10 response, I don't have for you a full analysis, but I think our viewpoints are
11 consistent with what other Commissions have done, consistent with the rules of
12 evidence, particularly their own rules of evidence of the Louisiana Public Service
13 Commission and I think we can deal with individual issues as we go along. So
14 are the parties wanting to make opening statements?

15 **MR. KARNO:** Yes ma'am. We have an opening statement. I believe we listed
16 it on the pre-hearing statement as well.

17 **JUDGE DEVITIS:** Okay.

18 **MR. KARNO:** Would you like AT&T to start?

19 **JUDGE DEVITIS:** Yes. Do you have some visual aids?

20 **MR. KARNO:** I do.

21 **JUDGE DEVITIS:** Some of the parties, if they don't have a screen available.

22 **MR. KARNO:** It is behind you.

23 **JUDGE DEVITIS:** Okay, that will do it, yes. Please proceed.

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
ORDER NO. PSC-12-0350-PCO-TP
ISSUED: July 5, 2012

ORDER DENYING HALO WIRELESS, INC.'S MOTIONS TO STRIKE TESTIMONY

On April 27, 2012, BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T) prefiled the Direct Testimony of AT&T witnesses J. Scott McPhee and Mark Neinast. On May 25, 2012, AT&T prefiled Rebuttal Testimony of witnesses McPhee and Neinast, as well as Raymond W. Drause. On June 19, 2012, Halo Wireless, Inc. (Halo) filed Objections to and Motions to Strike the Direct and Rebuttal Testimony of AT&T witnesses McPhee and Neinast, and the Rebuttal Testimony of AT&T witness Drause¹ (the "Motions"). On June 22, 2012, AT&T filed its Response in Opposition.

Halo's Objections and Motions to Strike Testimony

In its Motions to Strike, Halo asserts that "[u]nder Florida law, '[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded' from proceedings in which the substantial interests of the parties are at issue," citing Section 120.569(g), Florida Statutes (F.S.). Halo goes on to state that "[o]ther evidence shall be admissible, but only if it is 'of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs,'" and that "opinion testimony that amounts to a conclusion of law cannot be properly received in evidence."

With respect to witnesses McPhee and Neinast, Halo states that it objects to their testimony because it is "self-serving and speculative in nature," and "[t]he probative value, if any, is far outweighed by its prejudicial value." Halo maintains that to the extent that the witnesses present fact testimony, it objects to the entirety of such testimony on the grounds that AT&T has failed to lay a foundation based upon personal knowledge or reliance on admissible hearsay. Further, to the extent the witnesses provide expert testimony, Halo states it objects on the grounds that AT&T has failed to establish the testimony's reliability.

Halo avers that, in regards to witnesses McPhee and Neinast, it objects specifically to the witnesses' expert testimony regarding the rating and billing of traffic. Halo avers that this testimony "is not based on a reliable reasoning process" and therefore, "AT&T has failed to establish that [the] methodology is reliable."

With respect to witness Drause, Halo alleges the testimony "lacks sufficient foundation establishing: the basis for Mr. Drause's opinion and the underlying data supporting his opinion; that the testimony is based on reliable principles and methodology; that the testimony is based on

¹ Halo filed a separate Motion for each witness; given the substantial similarity of the Motions and the arguments contained therein, I will consolidate the ruling on all three.

reliable foundational assumption and data; that the testimony is based on reliable reasoning that would allow the methodology to be applied to the foundational data underlying his testimony; and that the data relied upon is of the type that is reasonably relied upon by experts in the appropriate field.” Halo maintains, therefore, that witness Drause’s testimony “is not relevant, is not probative, and is prejudicial to Halo’s substantive rights.”

Halo then goes on, in all three Motions, to detail its “specific objections” to each witness’s testimony, by page and line numbers; each “specific objection” is based upon one or more of the following grounds:

- (a) the testimony is neither fact nor expert, but is instead conclusions of law;
- (b) if fact testimony, the testimony fails to lay a foundation of personal knowledge and/or reliance on admissible hearsay;
- (c) if expert testimony, the testimony fails to establish the basis for the opinion, the underlying data supporting the opinion, that the testimony is based on reliable principles, methodology, foundational assumptions, and data, the reasoning and methodology applied to foundational data, and that the data is of the type that is reasonably relied upon by experts in the appropriate field;
- (d) statements offered to contradict the terms of written documents violate the parole evidence rule;
- (e) the testimony is self serving and speculative, and the probative value is outweighed by prejudicial value;
- (f) the testimony is not helpful to the trier of fact, is not relevant, is not testimony the witness is qualified to provide, and is not testimony that would be relied upon by a reasonably prudent person; and
- (g) exhibits to the witness’s testimony are hearsay to the extent they are offered to prove the truth of the matter asserted.

For relief, Halo asks that the Commission sustain its objections and strike the direct and rebuttal testimony of all three AT&T witnesses, including exhibits.²

AT&T’s Response in Opposition

In its Response, AT&T asserts that the testimony of its witnesses is “similar in kind to that which this Commission routinely and properly admits, and Halo’s motions to strike are frivolous.” AT&T then alleges that Halo has filed substantially similar motions to strike in six other states (Wisconsin, Tennessee, South Carolina, Georgia, Illinois, and Louisiana), and such motions to strike have been denied each time,³ and similarly, denial of the Motions should be the decision in this case.

² As pointed out by AT&T in its Reply in Opposition, while Halo enumerates specific pages and lines of testimony it asserts should be stricken, the prayer for relief references striking the direct testimony, rebuttal testimony and exhibits. It is unclear whether Halo intends this to mean only the enumerated pages and lines, or the entirety of the testimony. As I am denying the Motions, this is a distinction without a difference.

³ AT&T attaches either written decisions or excerpts from transcripts enunciating the denial of the motions to strike in each of the six states.

Citing Section 120.569(g), F.S., AT&T goes on to state that “‘evidence shall be admissible,’ so long as it is ‘of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.’” AT&T maintains that the testimony at issue in this case is the type routinely relied upon by this Commission.

AT&T then goes on to detail countervailing arguments to Halo’s specific objections listed above. AT&T avers that while Halo seeks to strike all of AT&T’s prefiled testimony, its motions cite no law and contain no analysis of the actual testimony being objected to, instead citing line numbers and then reciting “the same boilerplate objections over and over.” AT&T avers that “Halo never attempts to explain how any of its boilerplate objections apply...or how any part of the pre-filed testimony fails to meet the broad admissibility standard of Section 120.569(g).”

AT&T asserts that, despite the specific objections Halo repeats in the motions, any attempt to strike the prefiled testimony is improper, in that Halo’s objections are more properly directed to the weight of the evidence, and Halo is free to cross-examine AT&T’s witnesses during the hearing in order to ascertain the witness’s knowledge and basis for conclusions. Allowing the witnesses to testify, and allowing Halo to cross examine those witnesses, concludes AT&T, would allow the Commission to weigh the evidence and give it the probative value it deserves.

Analysis and Ruling

Commission proceedings are governed by Chapter 120, F.S., the Florida Administrative Procedures Act. Section 120.569, F.S., Decisions Which Affect Substantial Interests, controls in this matter. As cited by AT&T, Section 120.569(g), F.S. states:

(g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

In addition, Uniform Rule of Procedure 28-106.213(3), Florida Administrative Code (F.A.C.), states:

Hearsay evidence, whether received in evidence over objection or not, may be sued to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S. (the Florida Evidence Code.)

A review of Commission precedent supports AT&T’s contentions that this Commission applies a liberal interpretation of the statute, in favor of developing a complete record upon which to base a decision. As stated in Order No. PSC-09-0226-PCO-EI, issued April 10, 2009, in Docket No. 070703-EI, In re: Review of coal costs for Progress Energy Florida’s Crystal River Units 4 and 5 for 2006 and 2007:

As we have noted in other proceedings, the evidentiary rules for administrative hearings are liberal. (*citations omitted*) We are governed by evidentiary rules found in Chapter 120, F.S.: Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonable prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Section 120.569(2)(g), F.S.. (*See also* Section 120.57(1)(g), F.S., referenced above, regarding the admissibility of evidence.) Therefore, hearsay is admissible in administrative proceedings and only irrelevant, immaterial or unduly repetitive evidence should be excluded.

In the instant docket, I find that Halo's Motions to Strike the prefiled testimony of AT&T witnesses McPhee, Neinast, and Drause, are premature. As pointed out by AT&T, despite citing "specific objections" to portions of the prefiled testimony, in essence, all Halo does is repeat the same general objections. In effect, the motions are challenges to the weight and credibility of the witnesses' testimony. Halo fails to make any compelling argument that any of the testimony should be stricken prior to hearing; instead, Halo reiterates a litany of concerns, concerns which are exactly the type that cross examination would illuminate and, quite possibly, alleviate. If, for example, after cross examination, Halo believes a witness does not have personal knowledge of the facts asserted, and those facts are not of the type customarily relied upon by experts in the field, Halo would be free to object at that time. But I find that these prehearing, procedural motions to strike, prior to any voir dire or cross examination, are premature and must be denied.⁴

I likewise cannot sustain Halo's prehearing objections to the qualifications of AT&T's witnesses such that they be precluded from taking the stand. In Order No. PSC-01-1919-PCO-WU⁵ the Commission stated:

Due to the nature of this Commission's duties and the specialized and unique issues presented in Commission cases, most persons testifying at formal hearing are experts since they have acquired specialized training, education or extensive experience in the area in which they work. In Commission practice, a witness' professional and educational qualifications are set forth in his or her prefiled testimony and are accepted unless that witness' expertise is challenged.

We note that for reasons of administrative efficiency, Orders Establishing Procedure now require parties wishing to challenge a witness's qualifications to testify as an expert to file such objections, in writing, by the time of the

⁴ This matter has been litigated in at least six (6) other states, with witnesses McPhee and Neinast filing testimony in at least some of them. Halo has clearly had the opportunity to challenge these witnesses' qualifications and credibility in other proceedings, and could have alleged in these Motions specific objections, based on the witnesses' prior testimony, and yet has chosen not to do so, instead filing non-specific, general objections only.

⁵ Issued September 24, 2001, in Docket No. 991666-WU, In re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation.

Prehearing Conference so that we may schedule adequate time at the hearing for the resolution of such disputes.

See also Order No. PSC-95-0576-FOF-SU.⁶ AT&T has prefiled the testimony of its witnesses in accord with the Commission's well established procedures, including testimony regarding each witnesses' experience and qualifications. Halo has clearly provided notice of its objections to the qualifications of the witnesses, as required by the Order Establishing Procedure (Order No. PSC-12-0202-PCO-TP). At hearing, Halo shall have the opportunity to conduct voir dire of the witnesses, and then, if appropriate, challenge the qualifications of AT&T's witnesses, including whether they may testify as experts. Therefore, to the extent that Halo's Motions seek a ruling on its objections to the qualifications of AT&T's witnesses, such a ruling is premature.

Based on the foregoing, it is

ORDERED by Commissioner Eduardo E. Balbis, as Prehearing Officer that Halo Wireless, Inc.'s Objections to and Motions to Strike the Direct and Rebuttal Testimony of J. Scott McPhee and Mark Neinast, and the Direct Testimony of Raymond W. Drause, are DENIED.

⁶ “[o]ften in technical hearings before the Commission, party witnesses have particular expertise in their fields, as evidenced by their credentials contained in their prefiled testimony. Perhaps because so many witnesses testifying before the Commission have expert qualifications, generally when they are shown to have particular expertise in an area regarding which they are testifying, absent objection, their testimony is presumed to be expert witness testimony.” Order No. PSC-95-0576-FOF-SU, issued May 9, 1995, in Docket No. 940963-SU, In Re: Application for transfer of territory served by TAMIAMI VILLAGE UTILITY, INC., in Lee County, to NORTH FORT MYERS UTILITY, INC., cancellation of Certificate No. 332-S and amendment of Certificate No. 247-S; and for a limited proceeding to impose current rates, charges, classifications, rules and regulations, and service availability policies:

By ORDER of Commissioner Eduardo E. Balbis, as Prehearing Officer, this 5th day of July, 2012.

/s/ Eduardo E. Balbis
EDUARDO E. BALBIS
Commissioner and Prehearing Officer
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

LDH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.


CERTIFICATE OF SERVICE – PSC 2011-00283

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof via U.S. Mail, this 12th day of July 2012.

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