

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Halo Wireless, Inc.,)	
)	
Complainant)	
)	
v.)	Case No. TC-2012-0331
)	
Craw-Kan Telephone Cooperative, Inc. et al.,)	
)	
Respondents)	

**CRAW-KAN TELEPHONE COOPERATIVE ET AL.'S RESPONSE
TO HALO WIRELESS, INC.'S OBJECTIONS AND MOTIONS TO STRIKE**

COME NOW Respondents Craw-Kan Telephone Cooperative, Inc. et al. ("Craw-Kan et al.") and for their response to the objections of Halo Wireless, Inc. ("Halo") to the direct pre-filed testimony from the ten (10) Craw-Kan witnesses, state to the Missouri Public Service Commission ("Commission") as follows:

1. **The Commission's Rules of Evidence.** Missouri's Revised Statutes state:

All hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission. **And in all investigations, inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence.**

Section 386.410 RSMo. 2000 (emphasis added). The general rules of evidence in hearings before Missouri administrative agencies are set forth in some detail in Section 536.070 RSMo., which is adopted in its entirety by 4 CSR 240-2.130(1). Specifically, Section 536.070 provides for the admission into evidence of: (a) copies of original documents, (b) business records; and (c) the results of audits, statistical examinations, and studies:

(9) **Copies of writings, documents and records shall be admissible without proof that the originals thereof cannot be produced**, if it shall appear by testimony or otherwise that the copy offered is a true copy of the original, but the agency may, nevertheless, if it believes the interests of justice so require, sustain any objection to such evidence which would be sustained were the proffered evidence offered in a civil action in the circuit court, but if it does sustain such an objection, it shall give the party offering such evidence reasonable opportunity and, if necessary, opportunity at a later date, to establish by evidence the facts sought to be proved by the evidence to which such objection is sustained;

(10) **Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.** All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of such evidence, but such showing shall not affect its admissibility. The term "business" shall include business, profession, occupation and calling of every kind;

(11) **The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it.** All the circumstances relating to the making of such an examination, study, audit, compilation of figures or survey, including the nature and extent of the qualifications of the maker, may be shown to affect the weight of such evidence but such showing shall not affect its admissibility;

(Emphasis added). Thus, while the Commission may consider the circumstances related to the creation of such documents as it determines the weight to which they are entitled, the documents are generally admissible under Missouri law.

2. **Halo's objections.** On June 25, 2012, Halo filed its objections to the direct pre-filed testimony from the ten (10) Craw-Kan witnesses. Halo's objections to the testimony of the ten (10) Craw-Kan et al. witnesses were essentially the same and will therefore be addressed together.¹ Halo's objections cite to Missouri's Administrative Procedure Act in section 536.070 and cite to case law to the effect that "procedural formalities" require "adherence to evidentiary rules." However, Halo fails to acknowledge the specific Missouri statute which explains that the Commission is "not bound by the technical rules of evidence." §386.410. Likewise, Halo fails to identify the specific provisions in §536.070 that address evidence of: (a) copies of original documents, (b) business records; and (c) the results of audits, statistical examinations, and studies. Finally, it is worth noting that many other state utility commissions have recently denied similar objections. For example, the Wisconsin Public Service Commission stated that Halo's objections amounted "to a misplaced critique of the validity and the weight of the testimony."²

¹ For purposes of this response, citations will be to Halo's objections to the Direct Testimony and Exhibits of Le-Ru Telephone Company's witness Robert Hart.

² *Investigation into the Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.*, Wisconsin PSC Docket No. 9594-TI-100, *Order on Motions to Strike*, issued Feb, 27, 2012. The Wisconsin PSC observed that "the testimony relies on data either provided by the movants or gathered through standard industry practices. Each witnesses' education, experience, and company position provide sufficient basis to rely on the offered facts and analysis. The Commission typically admits data of this nature." *Id.* at p. 2.

3. **Foundation for Admissibility.** During the hearing, the foundation for Craw-Kan et al.'s pre-filed direct testimony and exhibits was clearly established. Craw-Kan et al.'s witnesses and their job positions and responsibilities with their respective telephone companies were identified. The witnesses testified that their testimony was true and correct to the best of their knowledge and belief. Craw-Kan et al.'s witnesses were primarily offered as "fact" witnesses, and these witnesses are all experienced in the telecommunications industry and intimately familiar with their respective company's billing procedures and telecommunications networks. Their company positions, education, experience, and industry knowledge clearly provide sufficient basis for the Commission to rely on their offered facts and analysis. The witnesses were all authorized by their respective companies to testify on behalf of those companies.

4. **Craw-Kan et al.'s Testimony.** Craw-Kan et al.'s testimony establishes that Halo traffic is being delivered to Craw-Kan et al.'s networks over the "Feature Group C" or "LEC-to-LEC" network for termination to Craw-Kan et al.'s customers. (Le-Ru Direct, p. 2) Although Craw-Kan et al. requested negotiations and offered the rates and terms of their agreements with other national wireless carriers, Halo refused to negotiate in good faith. (Le-Ru Direct, pp. 3, 4-5) Although Craw-Kan et al. invoiced Halo for Halo's traffic at their "wireless" rates, Halo has not paid for any of the traffic. (Le-Ru Direct, p. 4) Traffic studies conducted by AT&T demonstrate much of Halo's traffic is either interMTA wireless traffic or landline interexchange traffic which are both subject to access charges (either intrastate or interstate) that are higher than their wireless rates. (Le-Ru Direct, p. 6 and Exhibit 5 – Proprietary) On re-direct, Craw-Kan et al.'s witnesses testified that: (a) they relied on records and reports from AT&T that

were used in the ordinary course of business; (b) they had no reason to believe that the records were not accurate and reliable; (c) that it is standard industry practice in Missouri to use such records for billing wireless carriers; and (d) the other wireless carriers pay their bills based upon these records. See e.g. Peace Valley, Bosserman (Tr. 301-2); Craw-Kan, Wilbert (Tr. 313); Rock Port, Bradley (Tr. 322-23); Ellington, McCormack (Tr. 334); Seneca, Goodman, and Ozark, Mitchell (Tr. 347-48).

5. **Halo Traffic Delivered to Craw-Kan et al.**³ The testimony of Craw-Kan et al. establishes that Halo traffic is being delivered to Craw-Kan et al. Halo objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents. First, the foundation for the testimony was established at the hearing.⁴ Second, business records and information used in the ordinary course of business establish that Halo traffic is being delivered to Craw-Kan et al. Specifically, the Craw-Kan witnesses have reviewed the wireless traffic records (*i.e.* billing records) created by AT&T Missouri in the ordinary course of business and as a standard industry practice in Missouri under the Enhanced Record Exchange (ERE) Rule. See §536.070(9) and (10). Third, the specific studies of Halo's traffic provided by AT&T (*i.e.* the traffic studies in Exhibit 5) also demonstrate that Halo traffic is being delivered to Craw-Kan et al. See §536.070(11). Fourth, the Craw-Kan witnesses collectively have decades of experience in the telecommunications industry and are ideally suited to testify as to the traffic being delivered to their rural networks. Fifth, Halo's objection to the testimony that Halo traffic is being delivered to the Respondents

³ See e.g. Halo's objections to Le-Ru Direct Testimony, p. 2, lines 10-15.

⁴ See ¶3 above.

is absurd and illogical. If Halo traffic is not being delivered to Respondents, then why has Halo filed a complaint with the Commission to stop the blocking of such traffic?

6. **Craw-Kan et al. Invoices to Halo for Halo Traffic.**⁵ The testimony of Craw-Kan et al. establishes that Craw-Kan et al. have billed Halo for the Halo traffic that is being delivered to Craw-Kan et al. Halo objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents. First, the foundation for the testimony was established at the hearing.⁶ Second, business records and information used in the ordinary course of business establish that Craw-Kan et al. billed Halo for the Halo traffic that is being delivered to Craw-Kan et al. Specifically, the Craw-Kan witnesses have attached their billings to Halo produced in the ordinary course of business and as a standard industry practice in Missouri under the ERE Rule. See §536.070(9) and (10). Third, the Craw-Kan witnesses collectively have decades of experience in the telecommunications industry and are ideally suited to testify as to their company's invoices for traffic being delivered to their rural networks.

7. **Craw-Kan et al. Offer to Use Existing Wireless Agreements.**⁷ The testimony of Craw-Kan et al. establishes that Craw-Kan et al. offered Halo the same terms and conditions of its agreements with other wireless carriers, including the total element long run incremental cost (TELRIC) rates established by the Commission through arbitration. Halo objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents.

⁵ See e.g. Halo's objections to Le-Ru Direct Testimony, p. 4, lines 6-10.

⁶ See ¶3 above.

⁷ See e.g. Halo's objections to Le-Ru Direct Testimony, p. 5, line 20 through p. 6, line 2.

First, the foundation for the testimony was established at the hearing. Second, Craw-Kan et al.'s correspondence to Halo constitutes business records and information used in the ordinary course of business. Third, the Commission's own records independently establish and support the fact that the terms and conditions of these other agreements are available to Halo under the "opt-in" provisions of the federal Telecommunications Act. Fourth, the attached correspondence to Halo is expressly allowed by Section 536.070(9) RSMo. (copies of documents, records and writings).

8. **Amount of Halo Traffic Delivered to Craw-Kan et al.**⁸ The testimony of Craw-Kan et al. establishes that substantial amounts of Halo traffic is being delivered to Craw-Kan et al. Halo objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents. First, the foundation for the testimony was established at the hearing. Second, business records and information used in the ordinary course of business establish that substantial amounts of Halo traffic is being delivered to Craw-Kan et al. Specifically, the Craw-Kan witnesses have reviewed the wireless traffic records created by AT&T Missouri in the ordinary course of business and as a standard industry practice in Missouri under the ERE Rule. §536.070(9) and (10). Third, the traffic studies provided by AT&T also demonstrate that Halo traffic is being delivered to Craw-Kan et al. See §536.070(11). Fourth, the Craw-Kan witnesses collectively have decades of experience in the telecommunications industry and are ideally suited to testify as to the traffic being delivered to their rural networks as compared to the traffic being delivered by nationwide wireless carriers.

⁸ See e.g. Halo's objections to Le-Ru Direct Testimony, p. 6, lines 3-11.

9. Halo's objection to the testimony that Craw-Kan et al.'s witnesses learned of Halo's activities from industry meetings and discussions should also be denied. The Craw-Kan witnesses' job responsibilities include attending and participating in industry meetings and remaining informed about and aware of telecommunications industry issues such as Halo's multi-state access avoidance scheme. Thus, Craw-Kan et al.'s witnesses are all competent and qualified to testify as to these matters because they are included in their normal day-to-day job responsibilities. Indeed, this is the type of testimony that is routinely elicited and relied upon by the Commission. And even if this were not true, the testimony would still fall under the following exception to the hearsay rule: "A statement is not hearsay if the sole purpose of the offering is to show when a party was placed on notice or had knowledge of a condition." *Garnett v. S.S.Kresge* 85 S.W.2d 157 (Mo. App. WD 1935).

10. **AT&T Studies of Halo Traffic Delivered to Craw-Kan et al.**⁹ The testimony of Craw-Kan et al. establishes that substantial amounts of Halo traffic being delivered to Craw-Kan et al. includes prohibited interLATA wireline voice calls. Halo objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents. First, the foundation for the testimony was established at the hearing through the examination of AT&T witnesses and Craw-Kan witnesses. See e.g. Neinast Cross, Tr. 206-7; Rickett Re-Cross, Tr. 397-99. Second, the results of AT&T's traffic studies establish that substantial amounts of Halo traffic being delivered to Craw-Kan et al. consist of prohibited interLATA wireline traffic, and such traffic studies are allowed by §536.070(11). Indeed, these are exactly

⁹ See e.g. Halo's objections to Le-Ru Direct Testimony, p. 6, lines 12-20 and Exhibit. 5.

the types of traffic studies that have been historically allowed and relied upon by the industry and the Commission in numerous telecommunications cases. See e.g. *BPS Telephone Co. et al. v. Voicestream Wireless Co.*, Case No. TC-2002-1077, *Report and Order*, Jan. 27, 2005, pp. 24-45.

11. **Calling Party Number in Call Records.**¹⁰ The testimony of Craw-Kan et al. establishes that Craw-Kan et al. are unable to discern whether Halo is providing Originating Caller Identification with its traffic because the traffic is being delivered over common trunks commingled with other traffic from other carriers. Halo objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents. First, the foundation for the testimony was established at the hearing. Second, the Craw-Kan witnesses each have years of experience in the telecommunications industry and are ideally suited to testify as to their company's ability (or lack of ability) to determine calling party number from the information it receives in the ordinary course of business and as standard industry practice in Missouri. Third, this testimony is exactly the sort of testimony that the Commission regularly elicits and relies upon in its deliberations of industry-specific cases and examinations.

12. **Calling Party Number in Billing Records.**¹¹ The testimony of Craw-Kan et al. establishes that AT&T's records of Halo traffic does not provide Originating Caller Identification. Rather, the AT&T records simply include a billing number assigned to Halo and does not identify the telephone number of the party placing the call. Halo

¹⁰ See e.g. Halo's objections to Le-Ru Direct Testimony, p. 6, line 21 through p. 7, line 3.

¹¹ See e.g. Halo's objections to Le-Ru's Testimony, p. 7, lines 4-7.

objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents. First, the foundation for the testimony was established at the hearing. Second, the Craw-Kan witnesses each have years of experience in the telecommunications industry and are ideally suited to testify as to their company's ability (or lack of ability) to determine calling party number from the billing records provided by AT&T Missouri in the ordinary course of business and as standard industry practice. Third, this testimony is exactly the sort of testimony that the Commission regularly elicits and relies upon in its deliberations of industry-specific cases and examinations.

13. **Halo Blocking Request**.¹² The testimony of Craw-Kan et al. establishes that Craw-Kan et al. authorized counsel to pursue blocking of Halo's traffic over the LEC-to-LEC network in accordance with the Commission's ERE Rules. Halo objects that this testimony relies on hearsay lacking foundation and that the documents referred to are the best evidence of their contents. First, the foundation for the testimony was established at the hearing. Second, the correspondence sent to the Commission's Telecommunications Department, AT&T, and Halo constitute business records and information used in the ordinary course of business. See §536.070(9) and (10). Third, the Craw-Kan witnesses each have years of experience in the telecommunications industry and are ideally suited to testify as to their company's standard industry practices and procedures to commence blocking or disconnection for non-payment of services. In sum, this is exactly the sort of testimony that the Commission regularly elicits and relies upon in its deliberations of industry-specific cases and examinations.

¹² See e.g. Halo's objections to Le-Ru's Testimony, p. 7, lines 8-14.

14. **Exhibits**. Halo objects to all of the exhibits attached to Craw-Kan et al.'s testimony.¹³ Halo's objections must be denied because Section 536.070(9) and (10) provide for the admission into evidence of both business records and copies of original documents. Halo objects specifically to Exhibits No. 5 to Craw-Kan et al.'s direct testimony which are AT&T's traffic studies of the traffic being delivered to Craw-Kan et al. by Halo. The results of results of audits, statistical examinations, and studies are expressly allowed by Section 536.070(11), and the foundation for AT&T's traffic studies was addressed by the AT&T Witnesses and through cross-examination at the hearing. See e.g. Neinast Cross, Tr. 206-7.

CONCLUSION

Respondents Craw-Kan et al. respectfully request that the Commission overrule Halo Wireless, Inc.'s objections to Craw-Kan et al.'s testimony.

Respectfully submitted,

By: **/s/ Brian T. McCartney**
W.R. England, III Mo. #23975
Brian T. McCartney Mo. #47788
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
Jefferson City, MO 65102-0456
trip@brydonlaw.com
bmccartney@brydonlaw.com
(573) 635-7166
(573) 634-7431 (Fax)

Attorneys for Craw-Kan et al.

¹³ See e.g. page 6 of Halo's Objections to Le-Ru Testimony.

CERTIFICATE OF SERVICE

I hereby certify that Copies of this document were served on the following parties by e-mail on July 6, 2012:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Lewis Mills
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Jennifer M. Larson
Troy P. Majoue
Steven Thomas
McGuire, Craddock & Strother, PC
jl Larson@mcslaw.com
tmajoue@mcslaw.com
sthenomas@mcslaw.com

W. Scott McCollough
McCollough Henry PC
wsmc@dotlaw.biz

Louis A. Huber, III
Daniel R. Young
Schlee, Huber McMullen & Krause, PC
dyoung@schleehuber.com
lhuber@schleehuber.com

Leo Bub
AT&T Missouri
leo.bub@att.com

/s/ Brian T. McCartney