

**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

**STAFF RESPONSE TO HALO WIRELESS, INC.'S  
OBJECTIONS TO REBUTTAL TESTIMONY OF WILLIAM L. VOIGHT**

**COMES NOW**, the Staff ("Staff") of the Missouri Public Service Commission ("Commission") and for its *Staff Response to Halo Wireless, Inc.'s Objections to Rebuttal Testimony of William L. Voight*, states as follows:

Staff respectfully requests that all of Halo Wireless Inc.'s ("Halo") objections and Motion to Strike Mr. Voight's rebuttal testimony be overruled. Halo's objections are, for the most part, baseless, and aimed at wasting the time of the other parties to this

matter. Although Staff is sure Halo's objections are entirely without any merit, it will respond to each objection summarily first, and then later, to each individual objection.

**I. LEGAL STANDARDS**

**A. Generally**

Halo is correct that the Commission proceeds under Missouri's Administrative Procedures Act as found in RSMo 536.070, as supplemented by 4 CSR 240-2.130. However, Halo failed to mention the Commission's own governing statutes found in RSMo chapter 386, which indicates that the Commission is not bound by the technical rules of evidence. RSMo 386.410 (2000) provides that:

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.

Therefore, to the extent any of Halo's objections fall within the technical rules of evidence, Staff requests the objection be overruled.

**B. Mr. Voight is an Expert Witness**

First, Staff would like to acknowledge and apologize to the parties for the late receipt of Appendix 1 to Mr. Voight's Direct Testimony in this matter. The Appendices contains Mr. Voight's professional background, which includes nearly 40 years of experience in the telecommunications industry. The Commission Staff believe that this information sufficiently lays the foundation for Mr. Voight's testimony as an expert in the area of telecommunications.

While contested administrative proceedings are not required to follow technical rules of evidence, fundamental rules of evidence applicable to civil cases also are applicable in such administrative hearings, and standards for admission of expert

testimony constitute such a fundamental rule of evidence.<sup>1</sup> V.A.M.S. § 490.065 sets out the relevant standard for admission of expert testimony to an administrative hearing as standards for admission of expert testimony constitute a fundamental rule of evidence.<sup>2</sup> While the statute setting out the standard for admission of expert testimony expressly requires a showing that facts and data are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert's testimony, the court must also independently assess their reliability.<sup>3</sup> If a witness is certified as an expert, any shortcomings in qualifications go to the weight of the witness' testimony.<sup>4</sup>

As stated in Appendix 1 to Mr Voight's Direct Testimony, which was distributed to the parties at hearing, Mr. Voight has nearly 40 years of experience in the telecommunications industry. He helped to draft and put together the Commission's Enhanced Record Exchange rule ("ERE Rule")<sup>5</sup>. In reaching conclusions in this matter, Mr. Voight relied on the testimony, data requests, personal knowledge developed through years of experience, and his own investigation. This is the same type of information relied on by all Commission Staff witnesses in cases before the Commission, and Mr. Voight is clearly an expert witness in this area.

### **C. Mr. Voight's Testimony is Reliable**

Mr. Voight's testimony is based on his experience and the testimony and evidentiary documents filed in this matter, and the testimony contains sufficient foundation to establish its reliability.

---

<sup>1</sup> State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. 2003).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Plodzien v. Whaley, 610 S.W.2d 63, 65–66 (Mo.App.1980).

<sup>5</sup> 4 CSR 240-29.010 *et seq.*

An expert's opinion must be based on facts and data which give the opinion sufficient probative force to render it substantial evidence.<sup>6</sup> It cannot be based on speculation and conjecture.<sup>7</sup> Whether an opinion of an expert is based on and supported by sufficient facts and evidence is a question of law, and must be raised by a timely objection or motion to strike.<sup>8</sup> If there is sufficient factual basis for an expert's opinion, any challenge to the facts on which an expert bases his opinion, or any weaknesses in the factual underpinnings of that opinion, or in the expert's knowledge, go to the weight the testimony should be given, not its admissibility.<sup>9</sup> In determining whether the foundational requirements have been met, it must be determined whether (1) the facts and data are of a type reasonably relied upon by the experts in the particular field and (2) to ensure that the facts and data are otherwise reliable. Generally, an expert's opinion should be received unless it is "sheer speculation." The evidence on which an expert relies in forming an opinion need not be independently admissible.<sup>10</sup>

Mr. Voight's testimony in this matter has a sufficient factual basis. Halo has had the opportunity to expose any factual underpinnings that it may view as a weakness, and to the extent that the Commission agrees with Halo, they may grant Mr. Voight's testimony the weight it should be given. The fact of the matter is, Mr. Voight's testimony is based on facts, information, and data of the type typically relied on by Commission Staff. He has viewed the testimony and evidence as submitted by the parties to this

---

<sup>6</sup> State v. Pettit, 976 S.W.2d 585, 590 (Mo. Ct. App. W.D. 1998).

<sup>7</sup> Mueller v. Bauer, 54 S.W.3d 652, 658 (Mo. Ct. App. E.D. 2001).

<sup>8</sup> See Washington by Washington v. Barnes Hosp., 897 S.W.2d 611, 616, 41 A.L.R.5th 889 (Mo. 1995).

<sup>9</sup> Wadlow by Wadlow v. Lindner Homes, Inc., 722 S.W.2d 621, 627 (Mo. Ct. App. E.D. 1986) ("The factual underpinning of an expert witness' opinion goes to weight and credibility rather than admissibility.").

<sup>10</sup> Peterson v. National Carriers, Inc., 972 S.W.2d 349, 355 (Mo. Ct. App. W.D. 1998).

matter, he has done his own investigation, and used his own wealth of knowledge to reach his conclusions in this matter.

Mr. Voight's testimony contains sufficient foundation to establish its reliability, and Halo's objections on this point should be overruled.

#### **D. Mr. Voight's Testimony Does Not Constitute Legal Conclusions**

Although Mr. Voight's testimony may appear to be legal conclusions, it includes only his construction of the technical application of the rules, which he had a large part in drafting. As the rules are highly technical in nature, only a person with technical knowledge can ascertain whether a given rule applies to a given situation.

V.A.M.S. § 490.065.2 provides that "[i]n civil cases, testimony by an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." To the extent that "conclusion of law" is used as a synonym for "ultimate issue," § 490.065.2 eliminates the bar on testimony that incorporates such conclusions.<sup>11</sup> However, it has been said that there would be no error under this statute in asking a witness about an ultimate issue where the legal term had been defined, because when the legal term is defined for the jury, the legal issue becomes an ultimate fact issue for the trier of fact.<sup>12</sup>

Mr. Voight is well aware of the legal definitions that apply to the world of telecommunications, and has spent nearly forty years determining whether a set of circumstances conform to various telecommunications definitions. For example, this

---

<sup>11</sup> See, e.g., *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 513, Prod. Liab. Rep. (CCH) P 18096 (Mo. Ct. App. E.D. 2007), retransferred to Mo. Ct. of Appeals, (Sept. 30, 2008) and opinion adopted and reinstated after retransfer, (Oct. 6, 2008) (rejecting argument that expert's explanations of the regulatory requirements, and his interpretation of their meanings, was improper because this was a question of law for the court, and holding that this definition properly "became a definition of negligence for the purposes of this case").

<sup>12</sup> See *Lee v. Hartwig*, 848 S.W.2d 496, 498 (Mo. Ct. App. W.D. 1992), retransferred to Mo. Ct. of Appeals, (Mar. 23, 1993) and opinion adopted and reinstated after retransfer, (Mar. 26, 1993).

case hinges on the definitions related to the networks over which a call is routed. Mr. Voight's expertise is necessary to set forth his technical assessment of how the calls were routed, to assist the Commission in determining whether the call routing was proper. Likewise, Mr. Voight's testimony that the Enhanced Service Providers ("ESP") or Voice Over Internet Protocol ("VoIP") in the middle is actually what occurred (that both ends are Signaling System 7 landline) is necessary for the Commission to apply the current legal standard, which is that what begins and ends as a landline call on the public switched telecommunications network is a landline call for intercarrier compensation purposes. Without Mr. Voight's technical interpretation, the issue cannot be squarely presented to the Commission. Mr. Voight's testimony is proper expert testimony, does not constitute legal conclusions, and all of Halo's objections on these grounds should be overruled.

#### **E. Best Evidence Objections**

Halo's best evidence objections are inapplicable to any of Mr. Voight's testimony and should be overruled.

The best evidence rule requires that when the terms or contents of a writing are material and are in dispute, the original writing must be produced to prove those terms unless the failure to produce the original is satisfactorily explained.<sup>13</sup> That is so because the original writing provides the best evidence of its terms.<sup>14</sup> The rule exists primarily to ensure accuracy in situations where the exact words of a writing are

---

<sup>13</sup> State v. Elgin, 391 S.W.2d 341, 344–45 (Mo. 1965).

<sup>14</sup> Moschale v. Mock, 591 S.W.2d 415, 419 (Mo. Ct. App. S.D. 1979); Padgett v. Brezner, 359 S.W.2d 416, 422 (Mo. Ct. App. 1962).

important such as with deeds, wills, or contracts.<sup>15</sup> When the terms or contents of a writing are material but are not disputed, the rule does not apply.<sup>16</sup> Properly viewed, the best evidence rule is a rule of preference, not a rule of exclusion.<sup>17</sup> It is often said that the trial court has broad discretion in determining whether the best evidence rule applies.<sup>18</sup> However, it has also been said that the rule should be applied with common sense and only in settings where its true purposes are advanced.<sup>19</sup>

The best evidence rule does not apply when a witness is simply testifying on the basis of personal knowledge to facts or events which exist independently but which also happen to be contained in a writing.<sup>20</sup> Thus, the best evidence rule does not require the production of the original when a writing is merely a memorialization of or evidence of an underlying fact, event, or statement which exists independently of the writing.<sup>21</sup>

While there may be documents in this matter that contain material terms, Mr. Voight's testimony does not attempt to prove or disprove the terms of any writing. In its long list of objections, Halo had failed to specifically name any documents to which the best evidence rule would apply. In its pleadings, and at hearing, Halo has not challenged any terms of the documents discussed by Mr. Voight. Therefore, Halo's best evidence objections are without merit, without common sense, deride the true purpose of the rule, and should be overruled.

---

<sup>15</sup> Pool v. Farm Bureau Town & Country Ins. Co. of Missouri, 311 S.W.3d 895, 902–03 (Mo. Ct. App. S.D. 2010), transfer denied, (June 29, 2010).

<sup>16</sup> State v. Cameron, 604 S.W.2d 653, 660 (Mo. Ct. App. E.D. 1980) ("when the terms and contents of a writing are not in issue, application of the rule serves no meaningful purpose").

<sup>17</sup> State v. Powell, 648 S.W.2d 573, 575 (Mo. Ct. App. E.D. 1983) ("The best evidence rule ... merely embodies the law's preference for the best available evidence.").

<sup>18</sup> Grand & St. Louis Enterprises v. Powell, 807 S.W.2d 129, 131 (Mo. Ct. App. E.D. 1991).

<sup>19</sup> Chevalier v. Director of Revenue, State of Mo., 928 S.W.2d 388, 392–93 (Mo. Ct. App. W.D. 1996) (holding that trial court erred in applying best evidence rule to bar testimony concerning breathalyzer test results).

<sup>20</sup> Cooley v. Director of Revenue, State of Mo., 896 S.W.2d 468, 470–71 (Mo. 1995).

<sup>21</sup> *Id.*

## **F. Parol Evidence Objections**

The parol evidence rule is inapplicable in this matter and all of Halo's parol evidence objections should be overruled.

The parol evidence rule is not a rule of evidence but a rule of substantive contract law.<sup>22</sup> The parol evidence rule precludes oral evidence used to vary or contradict the terms of an unambiguous and complete written instrument absent fraud, common mistake, accident, or erroneous omission.<sup>23</sup>

None of Mr. Voight's objected-to testimony attempts to vary or contradict the terms of an unambiguous and complete written instrument. Therefore, Halo's objections are without merit and should be overruled.

## **II. SPECIFIC OBJECTIONS**

### **A. Lines 1:21-2:13**

#### **Halo's Objection:**

Halo objects that Mr. Voight's testimony constitutes legal conclusions that are neither helpful nor relevant and that Mr. Voight is not qualified to provide. Furthermore, to the extent that Mr. Voight's testimony could be considered expert opinion, the testimony lacks foundation establishing its reliability. In addition, the 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.

#### **Staff Response:**

This portion of Mr. Voight's rebuttal testimony is a summary of his testimony designed to give the reader an overview of what his testimony will contain. The foundation for which is found within the body of the testimony when discussed.

---

<sup>22</sup> Sherman v. Deihl, 193 S.W.3d 863 (Mo. Ct. App. S.D. 2006).

<sup>23</sup> Norden v. Friedman, 756 S.W.2d 158, Blue Sky L. Rep. (CCH) P 72919 (Mo. 1988).



Halo fails to cite which portion of this section of Mr. Voight's rebuttal testimony constitutes legal conclusions, and therefore Staff states that whatever conclusions Mr. Voight reaches are the sort an expert witness is entitled to give.

Further, Halo fails to point out which documents are the subject of the best evidence objection, however, Staff guesses that it is the Interconnection Agreement discussed at line 4. The terms of the Interconnection Agreement are not in dispute and have not been put into dispute by any of the parties, therefore the best evidence rule is inapplicable and the objection should be overruled.<sup>24</sup> Lastly, Mr. Voight has not attempted to vary or contradict the terms of the Interconnection Agreement and therefore the parol evidence objection is inapplicable.<sup>25</sup> For the foregoing reasons, Staff requests that all objections to the above testimony be overruled.

#### **B. Lines 2:14-3:10**

##### **Halo's Objection:**

Halo objects that Mr. Voight's testimony constitutes legal conclusions that are neither helpful nor relevant and that Mr. Voight is not qualified to provide. Furthermore, to the extent that Mr. Voight's testimony could be considered expert opinion, the testimony lacks foundation establishing its reliability. In addition, the 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.

##### **Staff Response:**

Halo fails to cite which portion of Mr. Voight's testimony constitutes legal conclusions; Staff surmises that this is a reference to whether Halo meets the statutory definition of a Commercial Mobile Radio Services ("CMRS") provider. Staff disagrees that this is a legal conclusion. Rather, by virtue of Mr. Voight's experience in the

---

<sup>24</sup> Mueller v. Bauer, 54 S.W.3d 652 (Mo. Ct. App. E.D. 2001).

<sup>25</sup> State v. Cameron, 604 S.W.2d 653, 660 (Mo. Ct. App. E.D. 1980).

telecommunications industry and as Staff's expert, Mr. Voight is entitled to reach conclusions about whether the type of service Halo is providing fits into his understanding of the term CRMS provider.

Further, Halo fails to point out which documents are the subject of the best evidence objection, however Staff guesses that it is the Interconnection Agreement discussed at line 5 of Mr. Voight's Rebuttal Testimony. The terms of the Interconnection Agreement are not in dispute, and have not been put into dispute by any of the parties, therefore the best evidence rule is inapplicable and the objection should be overruled.<sup>26</sup> Lastly, Mr. Voight's testimony has not attempted to vary or contradict the terms of the interconnection agreement and therefore the parol evidence objection is inapplicable.<sup>27</sup> Staff requests that all objections to the above testimony be overruled.

### **C. Line 6:17-8:9**

#### **Halo's Objection:**

Halo objects that Mr. Voight's testimony is neither relevant nor probative because the entity he discusses is not the same "Transcom" whose traffic is at issue in the present case and indeed Mr. Voight has not, and cannot establish any foundation for demonstrating that the entity he discusses is the same as the "Transcom" in this case. Further, the probative value, if any, is far outweighed by its prejudicial value.

#### **Staff Response:**

Mr. Voight's discussion of Transcom in his testimony is relevant to this case. The evidence presented at the hearing indicates that the same principals were involved in both "Transcom, Inc." and "Transcom" at issue in this case. A change in the corporate

---

<sup>26</sup> Mueller, 54 S.W.3d 652.

<sup>27</sup> State v. Cameron, 604 S.W.2d 653.

form, or the internal reorganization of a large holding company with numerous subsidiaries, including making subsidiaries holding companies or vice versa, does not alter in any way the fact that a group of human beings acted in concert to do something, and that same core group of human beings is still (or again) acting in concert to continue to do it. The continued illegal behavior of this group of people is both highly relevant to this matter and material to Commissioner Kenney's question about whether this was an intentionally criminal enterprise. Therefore, Staff requests that all objections to the above testimony be overruled.

**D. Lines 9:7-10:5**

**Halo's Objection:**

Halo objects that Mr. Voight's testimony is based on inadmissible hearsay. In addition, the 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.

**Staff Response:**

As noted above, an expert witness is entitled to rely on inadmissible hearsay in reaching his or her opinions.<sup>28</sup> Therefore, this portion of testimony should not be stricken from the record on that basis.

Again, Halo fails to point out which documents are the subject of the best evidence objection, however. Staff surmises that it is either Transcom's Missouri PSC certificate or its original application for a certificate.<sup>29</sup> The terms of these documents are not in dispute and have not been put into dispute by any of the parties, therefore the best evidence rule is inapplicable and the objection should be overruled.<sup>30</sup> Further, Mr.

---

<sup>28</sup> Peterson v. National Carriers, Inc., 972 S.W.2d 349 (Mo. Ct. App. W.D. 1998).

<sup>29</sup> Rebuttal Testimony of William L. Voight, page 9, lines 10-13 (filed June 19, 2012).

<sup>30</sup> Mueller, 54 S.W.3d 652.

Voight has not attempted to vary or contradict the terms of these documents and therefore the parol evidence objection is inapplicable.<sup>31</sup> Staff requests that all objections to the above testimony be overruled.

**Lines 10:6-18**

**Halo's Objection:**

To the extent Mr. Voight testifies that Halo is attempting to avoid lawful payment or is engaged in an access avoidance scheme, such testimony constitutes legal conclusions that are neither helpful nor relevant and that Mr. Voight is admittedly not qualified to provide. In addition, the 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.

**Staff Response:**

Staff disagrees that this is a legal conclusion. Rather, by virtue of Mr. Voight's experience in the telecommunications industry, and as Staff's expert and having seen such schemes before, Mr. Voight is entitled to reach conclusions about whether the actions Halo is engaged in constitute an access avoidance scheme. Therefore, Halo's objection based on legal conclusions should be overruled.

Mr. Voight does not reference any documents in this portion of testimony. Therefore, Staff is entirely flummoxed as to what the best evidence and parol evidence objections could be referring to. If the objection is referencing Mr. Wiseman's testimony, this is not the type of writing the best evidence rule is designed to protect.<sup>32</sup> In this portion of testimony, Mr. Voight is testifying regarding facts that exist independent of Mr. Wiseman's testimony.<sup>33</sup> Therefore this objection is inapplicable. Further, the

---

<sup>31</sup> State v. Cameron, 604 S.W.2d 653.

<sup>32</sup> Wadlow by Wadlow v. Lindner Homes, Inc., 722 S.W.2d 621 (Mo. Ct. App. E.D. 1986).

<sup>33</sup> State v. Cameron, 604 S.W.2d 653.

parol evidence rule is a substantive rule of contract law and does not apply, as there is no discussion of any contract or contract interpretation in this portion of testimony. Staff respectfully requests that all objections to this portion of testimony be overruled.

**E. Lines 10:19-11:8**

**Halo's Objection:**

To the extent Mr. Voight testifies that Halo is attempting to use other people's property for free, such testimony constitutes legal conclusions that are neither helpful nor relevant and that Mr. Voight is not qualified to provide. In addition, the 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.

**Staff Response:**

Staff believes Halo has misidentified the portion of testimony they would have struck. This portion of testimony does not mention using other people's property for free. Staff disagrees that "using other people's property for free," is a legal conclusion, but rather, by virtue of Mr. Voight's experience in the telecommunications industry, as Staff's expert, and having seen such schemes before, Mr. Voight is entitled to reach conclusions about whether the actions Halo is engaged in constitute using other people's property for free. Therefore, Halo's objection based on legal conclusions should be overruled.

Mr. Voight does not reference any documents in this portion of testimony. Therefore Staff is again flummoxed as to what the best evidence and parol evidence objections could be referring to. If the objection is referencing Mr. Wiseman's testimony, this is not the type of writing the best evidence rule is designed to protect,<sup>34</sup> and therefore this objection is inapplicable. Further, the parol evidence rule is a

---

<sup>34</sup> Wadlow by Wadlow, 722 S.W.2d 621.

substantive rule of contract law and does not apply, as there is no discussion of any contract or contract interpretation in this portion of testimony. Staff respectfully requests that all objections to this portion of testimony be overruled.

**F. Lines 12:4-12:11**

**Halo's Objection:**

To the extent Mr. Voight testifies that Halo is engaged in access avoidance, such testimony constitutes legal conclusions that are neither helpful nor relevant and that Mr. Voight is not qualified to provide. In addition, the 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.

**Staff Response:**

Staff disagrees that this is a legal conclusion, but rather, by virtue of Mr. Voight's experience in the telecommunications industry and as Staff's expert, having seen such schemes before, Mr. Voight is entitled to reach conclusions about whether the actions Halo is engaged in constitute an access avoidance scheme. Therefore, Halo's objection based on legal conclusions should be overruled.

Mr. Voight does not reference any documents in this portion of testimony. Staff cannot discern what the best evidence and parol evidence objections could be referring to. If the objection is referencing Mr. Wiseman's testimony, this is not the type of writing the best evidence rule is designed to protect,<sup>35</sup> and therefore this objection is inapplicable. Further, the parol evidence rule is a substantive rule of contract law and does not apply, as there is no discussion of any contract or contract interpretation in this portion of testimony. Staff respectfully requests that all objections to this portion of testimony be overruled.

---

<sup>35</sup> *Id.*

## **G. Lines 12:12-20:11**

### **Halo's Objection:**

Halo objects that Mr. Voight's testimony constitutes legal conclusions that are neither helpful nor relevant and that Mr. Voight is not qualified to provide. Furthermore, to the extent that Mr. Voight's testimony could be considered expert opinion, the testimony lacks foundation establishing its reliability. In addition, the 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.

### **Staff Response:**

Staff would note that this objection encompasses eight pages of testimony with no direct citation to any testimony Halo finds objectionable.

Staff disagrees that any of Mr. Voight's conclusions are legal conclusions. Rather, by virtue of Mr. Voight's experience in the telecommunications industry and as Staff's expert, Mr. Voight is entitled to reach conclusions about what type of service Halo is or is not providing, what Halo is or is not doing, and whether Halo is or is not aggregating wireline traffic using a wireless interconnection agreement.

Mr. Voight is an expert, and by virtue of his work experience and the evidence in this case, he has relied on information of the type typically relied on by Commission Staff in reaching their conclusions.

Lastly, Staff is in the dark as to what the best evidence and parol evidence objections could be referring to and respectfully requests the Commission overrule Halo's Objections to this portion of testimony.

## **H. WLV 1**

### **Halo's Objection:**

Halo objects that Schedule WLV 1 is hearsay, and the Staff has not laid a foundation establishing its admissibility.

**Staff Response:**

Staff argues that WLV 1 is not inadmissible hearsay, but rather an admission of a party opponent. An admission by a party opponent, which may be admissible as an exception to the hearsay rule, may include the party's own statement, statements which the declarant manifestly believed or adopted, authorized statements, and statements by one in privity with the declarant.<sup>36</sup> An admission is a conscious or voluntary acknowledgement by a party regarding certain facts relevant to the adverse party's cause, and the matter must be unfavorable to or inconsistent with the position taken by the party opponent.<sup>37</sup> Admissions are admissible in evidence to show the existence of facts which they tend to prove.<sup>38</sup>

As Transcom is Halo's only customer in Missouri,<sup>39</sup> and a representative of Transcom provided testimony for Halo in this matter,<sup>40</sup> Staff believes Transcom should be considered "in privity" with Halo, and WLV 1 should be considered an admission. Accordingly, Halo's objections to this exhibit should be overruled.

In the alternative, Staff argues that the exhibit is not hearsay. Mr. Voight is not using the exhibit for the truth of what it states, but rather as an example of how Transcom holds itself out to the public. Therefore Transcom's hearsay objection should be overruled.

---

<sup>36</sup> Gordon v. Oidtman, 692 S.W.2d 349, 355 (Mo.App.1985).

<sup>37</sup> Albertson v. Wabash R. Co., 363 Mo. 696, 253 S.W.2d 184, 189 (1952).

<sup>38</sup> State ex rel. Taylor v. Anderson, 363 Mo. 884, 254 S.W.2d 609, 615 (1953).

<sup>39</sup> Rebuttal Testimony of William L. Voight, page 12, line 1 (filed June 19, 2012).

<sup>40</sup> Pre-Filed Rebuttal Testimony of Robert Johnson on Behalf of Halo Wireless, Inc., Filed June 19, 2012, (I am supplying testimony concerning Transcom Enhanced Services, Inc. ("Transcom"), which is a business end user customer that purchases wireless-based telephone exchange service from Halo Wireless, Inc. ("Halo").)



**WHEREFORE**, the Staff respectfully requests that the Commission overrule *Halo Wireless, Inc's Objections to Rebuttal Testimony of William L Voight*.

Respectfully submitted,

**/s/ Meghan McClowry**

Meghan E. McClowry  
Assistant Staff Attorney  
Missouri Bar No. 63070

Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-6651 (Telephone)  
(573) 751-9285 (Fax)  
Meghan.mcclowry@psc.mo.gov

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6<sup>th</sup> day of July, 2012.

**/s/ Meghan McClowry**