

**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.,)	
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, Moka Dial, Inc.,)	
Peace Valley Telephone Company, Inc., and)	
Southwestern Bell Telephone Company,)	
d/b/a AT&T Missouri,)	
)	
Respondents.)	

**AT&T MISSOURI’S MEMORANDUM IN OPPOSITION TO
HALO’S MOTIONS TO STRIKE AT&T MISSOURI’S TESTIMONY**

AT&T Missouri¹ respectfully submits this memorandum in opposition to Halo’s² Motions to Strike *all* of the testimony filed by AT&T Missouri in this matter, namely, the Direct and Rebuttal Testimony of J. Scott McPhee, the Direct and Rebuttal Testimony of Mark Neinast, and the Rebuttal Testimony of Raymond W. Drause.³

¹ Southwestern Bell Telephone Company, d/b/a AT&T Missouri will be referred to in this pleading as “AT&T Missouri.”

² Halo Wireless, Inc. will be referred to in this pleading as “Halo.”

³ Although the three motions to strike that Halo filed include specific objections to certain passages in the testimony, each motion, both in the first paragraph and in its conclusion, requests that the testimony be struck in its entirety.

AT&T Missouri's testimony is similar in kind to that which this Commission routinely, and properly, admits, and Halo's motions to strike are frivolous. Under Missouri law, the Commission "shall not be bound by the technical rules of evidence," and "[n]o formality in any proceeding nor in any manner of taking testimony before the commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission." Mo. Rev. Stat. § 386.410. Thus, like most state public utility commissions, the Commission is not bound by technical rules of evidence, and has great leeway in deciding what sort of evidence to admit. Indeed, as Halo and AT&T incumbent local exchange carriers litigate Halo's conduct across the country, the denial of Halo's motions to strike is now an established ritual: Halo files its baseless motions; the motions are briefed; the motions are denied; and the case goes forward. That has been the result in all seven state commissions that have so far considered Halo's stock motions to strike – Wisconsin, Tennessee, South Carolina, Georgia, Illinois, Louisiana, and Florida⁴ – and it should be the result here as well.

As a threshold matter, Halo's motions are defective on their face. Halo seeks to strike virtually all of AT&T Missouri's pre-filed testimony, yet its motions contain no analysis of any of the actual testimony being objected to. 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 attempts to explain how any of its boilerplate objections apply to any particular portion of testimony. 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 denying Halo's virtually identical objections in AT&T South Carolina's complaint case against Halo there, "[b]oth Halo's objections and its

⁴ See Attachments A through H hereto.

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." Att. C at 1. It is not the Commission's task to hunt through testimony and try to decipher what Halo is talking about.

In addition, Halo's conclusory objections are without merit in any event. Halo's objections to all the testimony are substantially identical (though the testimony is not), so AT&T Missouri 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 Missouri'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 Missouri's general positions regarding those matters. In doing so, they take appropriate care to leave it to AT&T Missouri'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. Att. 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 from their education, training and direct work experience as longtime AT&T employees; and on specific knowledge they have developed from personally investigating the facts in this case. Mr. Drause relies on his specific investigation of Halo and Transcom's network arrangement as well as decades of engineering experience in the industry. While Halo was free to cross-examine these witnesses as to their qualifications, it did little beyond a cursory inquiry into whether they were lawyers (despite clear indications in their pre-filed testimony that they were not providing legal opinions⁵). Halo has failed to articulate any specific ground to question the validity of the AT&T Missouri witnesses' testimony and its attempt to prevent the testimony's admission into evidence is baseless. *See 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 hearsay claims are similarly misplaced. The records underlying the call studies that Mr. Neinast from AT&T's Network Planning and Engineering Department sponsored are not hearsay. Rather, they are business records, for the studies are compilations of records created and kept in the ordinary course of business by AT&T Missouri's switching systems as they handled each of the calls summarized in the studies.⁶ The Missouri Administrative Procedure Act, Section 536.070(10) RSMo. (2011) provides:

⁵ *See, e.g.*, AT&T Exhibit 1, McPhee Direct, pp. 21-22; AT&T Exhibit 2, McPhee Rebuttal, p. 18; AT&T Exhibit 3, Neinast Direct, pp. 22, 27; and AT&T Exhibit 4, Neinast Rebuttal, p. 3, 13, 15-16, 19, 23; and AT&T Exhibit 5, Drause Rebuttal, p. 10.

⁶ AT&T Exhibit 3, Neinast Direct, pp. 10-14, Schedule MN-4, 5 and 6.

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;

Halo's hearsay objections to its own documents and prior statements that AT&T witnesses attached to their testimony as schedules⁷ should be overruled because these are not hearsay either, since they constitute admissions of a party opponent.⁸ Copies of AT&T correspondence to Halo that AT&T witnesses attached to their testimony as schedules⁹ also constitute business records under Section 536.070(10) and are expressly allowed by Section 536.070(9) RSMo. (copies of documents, records and writings).

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 studies that Mr. Neinast sponsored. But under applicable Missouri law, such claims go at best to the weight of the testimony, not its admissibility:

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

⁷ AT&T Exhibit 1, McPhee Direct, Schedule JSM-1 (Halo pleading from Wisconsin case); Schedule JSM-2 (transcript of examination of Halo witnesses Russell Wiseman and Jeff Miller); Schedule JSM-3 (pages from Halo's website); Schedules JSM-6 and 7 (Halo correspondence to FCC); Schedule JSM-8 (transcript of representations made by Halo counsel before Wisconsin PSC); AT&T Exhibit 4, Neinast Rebuttal, Schedule MN-9 (testimony of Halo witness Russell Wiseman to the Wisconsin PSC).

⁸ *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 124 (Mo 1995) (admission of an agent or employee . . . "may be received in evidence against his principal, if relevant to the issues involved, where the agent, in making the admission, was acting within the scope of his authority, . . .").

⁹ AT&T Exhibit 1, McPhee Direct, Schedules JSM-9 and 10 (AT&T correspondence to Halo)

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;*¹⁰

Here, the call studies were prepared by Mr. Neinast, who holds a degree in management information systems and gained his expertise on AT&T Missouri's network and switching systems over a 36 year career within AT&T's network organization that included working as a central office technician, a training instructor for electronic switching systems, and managing company technicians within AT&T central offices, network operations centers, and on major switching system projects.¹¹ Mr. Neinast appeared at the hearing, testified to the studies' accuracy and was subject to cross examination by all parties – just as he has been in seven other states in prior hearings on nearly identical testimony and studies. Under Section 536.070(11) RSMo., and consistent with the orders of the seven other state commissions that have considered this same issue, the Commission should admit Mr. Neinast's testimony and the call studies he sponsored into evidence, (although Halo is certainly free to make its own contrary case through testimony and cross-examination). *See* Att. 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."); Att. C at 1 (rejecting motion to strike because Halo's "objections go to the weight, rather than the

¹⁰ Section 536.070(11) RSMo. (2011) (emphasis added).

¹¹ AT&T Exhibit 3, Neinast Direct, pp. 1-2.

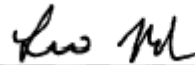
admissibility of the evidence. All parties will have full cross-examination rights of all witnesses presented, thereby allowing the Commission to fully weigh the merits of the evidence.”). Likewise, Halo’s assertions that the testimony is “self-serving,”¹² “speculative,” “demonstrably untrue,” or not 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 seven other state commissions that have considered Halo’s baseless objections, should reject them and deny Halo’s motions to strike.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

BY _____



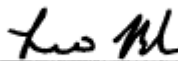
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¹² Halo’s objection that the testimony is “self-serving” is especially ludicrous. Would Halo suggest that its witnesses’ pre-filed testimony is not self-serving? The parties’ briefs will be self-serving as well.

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on July 6, 2012.



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