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 Drause[1] (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 it's 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-WU[5] 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.
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> 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.

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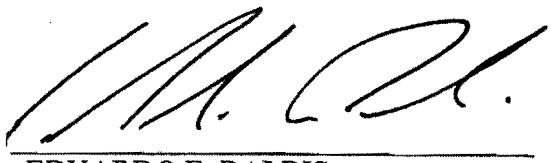
[6] "[o]ften in technical hearings before the Commission, party witnesses have particular expertise in their fields, as evidenced by their credentials contained in their prefiled testimony. Perhaps because so many witnesses testifying before the Commission have expert qualifications, generally when they 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.



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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.

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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.