

PUBLIC SERVICE COMMISSION OF WISCONSIN

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

9594-TI-100

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.

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.

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:

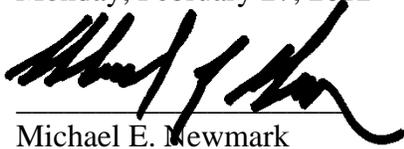
(1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent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

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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. Newmark", written over a horizontal line.

Michael E. Newmark
Administrative Law Judge

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