McCollough|Henry PC

dotLAW.biz
W. Scott McCollough
1250 South Capital of Texas Highway, Bldg 2-235
West Lake Hills, Texas 78746
Phone: 512.888.1112
Fax: 512.692.2522
wsmc@dotlaw.biz

Board Certified Administrative Law

January 14, 2010

Joelle Phillips
General Attorney – TN
AT&T Tennessee
333 Commerce Street, STE 2101
Nashville, TN 37201-1800

Via E-Mail: jp3881@att.com
Via FAX: 615.214.7406

RE: Docket No. 11-00119, *AT&T Tennessee v. Halo Wireless, Inc.*; notice pursuant to Evidence Rules 702, 703, 705 and 1006.

Dear Ms. Phillips:

Thank you for participating in our conference call this past Friday afternoon.

As I informed you, our request for subpoena was not an attempt to conduct discovery. Rather, we were providing you advance notice that we intend to insist that AT&T disclose the facts and/or data underlying the opinions and inferences proffered by your two witnesses in their pre-filed testimony. This is your "evidence" and you have the burden of showing it is admissible. We, in turn, have the right to conduct reasonable cross-examination should the evidence be admitted.

We reserve the right to object to admission of the purported expert opinions under Tennessee Rules of Evidence R. 702 and we reserve the right to object to admission of the opinions and/or inferences to the extent the underlying facts or data indicate lack of trustworthiness. *See* Rule 703. Similarly, we have given fair notice that we desire disclosure of the underlying facts or data so that we can conduct cross-examination. *See* Rule 705. Further, your two witnesses performed calculations using voluminous data and summarized that data through narrative and in attachments. Pursuant to Rule 1006 we request that the source data be made available for examination.

We are aware that under Tenn. Code Ann. §65-2-109(1) the TRA is not strictly bound by the rules of evidence applicable in a court, and it may admit and give probative effect to any evidence "which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs." This is not a "hearsay" issue, however; instead we are addressing whether the proffered evidence is "incompetent, irrelevant [or] immaterial." The question is whether the testimony and attachments should be admitted, and admission will not be proper unless the analysis and methods used are shown to be reliable and professionally performed, using proper methods. If the evidence is admitted, Halo has the right to conduct reasonable cross-examination under Tenn. Code Ann. § 65-2-109(3) and you now have notice that the underlying information must be disclosed in order for us to do so.

A short time before our call re learned that around 3:12 p.m. the TRA adopted the protective order you filed earlier in the day and emailed to us at approximately 11:37 a.m. We

did not have an opportunity to comment on those terms before entry of the order. Our intent was to discuss our concerns during the telephone conversation and then if necessary make a filing with the Authority. I listed Halo's concerns during the call. First, the terms were obviously drafted with discovery in mind, rather than in the context of expert support data disclosed at or soon before the hearing. This may lead to some problems. While we will do all we can to avoid any contest over confidentiality it may be that we feel it is necessary to challenge a confidential designation. The plain terms of ¶ 11, however, would have required us to make the challenge several days ago (10 days before the hearing) even though we have obviously not yet even seen the information. We reserve the right to challenge confidentiality notwithstanding ¶ 11. I also explained that I will need Mr. Johnson's assistance during the hearing but he would not be eligible to see any confidential information under ¶ 3 since he does not meet the criteria in (a), (b) or (c). Finally, during the phone call I gave you the notice required under ¶ 8 that we do intend to use some of the information. We will be filing this letter with the Authority and that filing will fulfill the rest of the duty imposed by ¶ 8. I hope that you will be able to agree to reasonable modifications to facilitate the presentation of evidence in the event the terms of the protective order would operate to deny Halo its procedural due process rights, including but not limited to the ability to conduct reasonable cross-examination.

Thank you again for discussing these matters with us on Friday.

Sincerely,

W. Scott McCollough