

STATE OF MISSOURI
MISSOURI PUBLIC SERVICE COMMISSION

In the matter of:)	
)	
NEXUS COMMUNICATIONS, INC.)	
)	
Complainant,)	
v.)	DOCKET NO. TC-2011-0132
)	
SOUTHWESTERN BELL TELEPHONE CO.)	
D/B/A AT&T MISSOURI)	
)	
Respondent.)	

NEXUS COMMUNICATIONS, INC.’S MOTION TO RECONSIDER
ORDER GRANTING IN PART, AND DENYING IN PART,
AT&T’S MOTION TO COMPEL

ORAL ARGUMENT REQUESTED

1. Complainant Nexus Communications, Inc. (“Nexus”) respectfully requests reconsideration of the tribunal’s *Order Granting In Part, and Denying in Part, AT&T’s Motion to Compel* (“Order”).
2. Nexus has carefully limited this case to situations where Southwestern Bell Telephone Co. d/b/a AT&T Missouri (“AT&T”) has already approved the underlying orders seeking promotion credits, and framed this case in order to streamline consideration of the key issue: what amount should be paid at wholesale where it is undisputed that an order qualifies for a cash back promotion. Now, AT&T improperly seeks to circumvent the dispute resolution provisions of the parties interconnection agreement (“ICA”) by hi-jacking this case and diverting it into a case for examining each

of the 15,634 orders AT&T previously approved, even though AT&T did not follow the prescribed procedures contemplated by the ICA for disputing such orders.

3. While 4 CSR 240-2 generally governs practice and procedure before the Missouri Public Service Commission (“Commission”) and 4 CSR 240-2.070 specifically allows parties to present their defenses, those defenses may, as here, nevertheless be circumscribed by the parties’ agreement. In this case, the parties have previously agreed that disputes about billings or credits must be identified and pursued through an elaborate dispute resolution process. Nexus had to follow that process; so must AT&T. However, in this case, AT&T has approved the orders and credits submitted by Nexus that underlie this case, and never attempted use the dispute resolution process to identify and challenge those credit approvals.

4. As a consequence, AT&T is estopped from using this proceeding to circumvent those dispute identification and resolution procedures, and cannot be allowed to change this case from an inquiry into the single question – what the appropriate wholesale price should be when telecommunications services are undisputedly eligible for cash back promotions – to 15,634 discrete inquiries into the underlying eligibility of each order. The expense of the legal resources necessary to examine each order would quickly dwarf the value of the case as a whole. On reconsideration, the motion to compel should be denied.

I. BACKGROUND

5. AT&T’s Data Requests 7, 8, and 9 sought evidence “that the end users for whom Nexus placed orders claiming a promotional cash back credit were actually qualified (or

“eligible”) for the promotional credits” now at issue.¹ Nexus objected to these data requests on the grounds that they are irrelevant and not calculated to lead to the discovery of admissible evidence, given that Nexus’ case is based only on undisputed credit requests.

6. On July 6, 2011, the Commission initially compelled responses these to these requests. The Commission’s order indicated that this discovery was permissible because (1) the Commission’s rules allow AT&T to raise defenses; and (2) Nexus’ own complaint put at issue whether credits are due by stating that “. . . Nexus is entitled to recover all underpaid promotional credits due.”

7. Although Nexus believes its *First Amended Complaint* was reasonably clear in framing the dispute as being over of the **amount** due when a promotional credit *is* due,² on July 11, 2011, Nexus filed (subject to leave) its *Second Amended Complaint* to remove all doubt.

8. Nexus does not allege any new claims in its *Second Amended Complaint*, but erases any doubt as to whether AT&T approved and deemed valid those promotional credit requests – promotional credit requests that AT&T ultimately credited Nexus, but at the wrong (improperly reduced) amount. Thus, the issue to be considered by the Commission is *not* a question of eligibility, but rather a question of **how much** is due Nexus **when a promotional credit request has been approved and deemed eligible by**

¹ *Motion*, page 2, ¶2.

² In its *First Amended Complaint*, Nexus asked the Commission for a declaration that AT&T must offer telecommunications services “at the standard/tariffed price, less the wholesale discount, less the full amount of the cash back promotion.” *Nexus Communications, Inc.’s First Amended Complaint*, page 19. (Emphasis omitted) Additionally, Nexus asked the Commission for a ruling whereby “Nexus is entitled to recover all underpaid promotional credits due.” *Id.* The relief requested is clear: (1) declare the method used to calculate the wholesale price for telecommunications services subject to a cash back promotion to be the standard/tariffed price, less the wholesale discount, less the full amount of the cash back promotion and (2) rule that Nexus is entitled to the amount under-credited by AT&T when a promotional credit is due. Nexus is simply disputing the **amount** owed Nexus by AT&T **when** a promotional credit is due, not whether the credit is due in the first place.

AT&T. To make this point crystal clear, Nexus requests relief in its *Second Amended Complaint* that includes the Commission issue: (1) a declaration that AT&T must offer telecommunications services “at the standard/tariffed price, less the wholesale discount, less the full amount of the cash back promotion and (2) a ruling “that Nexus is entitled to recover all underpaid amounts for promotional credits already approved and deemed valid by AT&T.”³

9. Because the scope of Nexus’ complaint is narrowly tailored only to include only those promotional credit request which AT&T approved, deemed eligible, partially paid, and did not dispute, the eligibility and/or qualification of Nexus’ promotional credit requests are outside the scope of the issue now before the Commission. Thus, AT&T Data Requests 7, 8, and 9 are irrelevant and not calculated to lead to the discovery of admissible evidence.

II. DATA REQUESTS 7, 8, AND 9 ARE IRRELEVANT AND NOT CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE

- A. Order eligibility and/or qualification are not properly at issue in this case, and AT&T is estopped from attempting to dispute eligibility issues until it follows the agreed procedures for identifying and validating disputes.**

10. The parties employ an elaborate dispute resolution procedure to help them identify and resolve disputes regarding ordering, billing, and crediting issues. The parties have clearly agreed that “**No Party may pursue any claim unless** [the Dispute Resolution measures are followed.]” General Terms and Conditions, Section 10.3.1.⁴ Among other

³ Nexus Communications, Inc.’s *Second Amended Complaint*, pages 20-21. (Emphasis omitted).

⁴ **10. DISPUTE RESOLUTION**

10.3 Commencing Dispute Resolution

things, in order to dispute a charge or credit, the disputing party must provide at least the following information relating to the order at issue:

- Record type;
- Claim type;
- Account identification;
- Billing date;
- Claim number;
- Amount requested;
- Circuit identification/actual telephone number; and
- Comments.

11. Although AT&T has had ample opportunity,⁵ AT&T has never followed this procedure and disputed any of the underlying orders for which it initially granted credit to

10.3.1 Dispute Resolution shall commence upon one Party's receipt of written notice of a controversy or claim arising out of or relating to this Agreement or its breach. **No Party may pursue any claim unless such written notice has first been given to the other Party.** There are three (3) separate Dispute Resolution methods:

10.4 LSC/Service Center/LEC-C Dispute Resolution – the following Dispute Resolution procedures will apply with respect to any billing dispute arising out of or relating to the Agreement.

10.4.4 Any notice of Disputed Amounts given by SBC-13STATE to CLEC pursuant to Section 10.3 shall furnish CLEC written notice of: (i) the date of the bill in question, (ii) the account number or other identification of the bill in question, (iii) any telephone number, circuit ID number or trunk number in question, (iv) any USOC (or other descriptive information) questioned, (v) the amount billed, (vi) the amount in question, and (vii) the reason that SBC-13STATE disputes the billed amount. The Parties shall attempt to resolve Disputed Amounts appearing on current billing statement(s) thirty (30) to sixty (60) calendar days from the Bill Due Date (provided SBC-13STATE, furnishes all requisite information by the Bill Due Date) and Disputed Amounts appearing on statements prior to the current billing statement within thirty (30) to ninety (90) calendar days, but resolution may take longer depending on the complexity of the dispute. If not resolved within thirty (30) calendar days, CLEC will notify SBC-13STATE of the status of the dispute and the expected resolution date.

[Emphasis added.] Nexus adopted the ICA arbitrated and agreed upon between Southwestern Bell Telephone, L.P., d/b/a/ SBC Missouri and Sprit Communications Company, L.P., Case. No. TK-2006-0044, effective August 10, 2005.

⁵ At the time Nexus first applied for the promotional credits (beginning in August 2008), AT&T did not dispute Nexus' eligibility; in fact, AT&T approved and deemed valid each and every one of Nexus' promotional credit requests at issue by its own methods and processes and further credited Nexus with an amount for those very

Nexus. Relying on this fact, Nexus purposefully confined its request for relief in this case to only those promotional credit requests whose eligibility had not (and still have not) been formally disputed by AT&T as required by the ICA.⁶ In fact, Nexus has amended for a second time its complaint to remove all doubt as to the orders and relief it seeks in the proceeding.

12. While Nexus understands that, in general, a party is allowed to raise (and may even be required to assert) defenses under Commission rules, the defenses a party has may be circumscribed by prior agreement. Nexus concedes that, theoretically, had AT&T properly disputed credits previously issued to Nexus for any reason (eligibility or otherwise), AT&T could assert and develop those disputes as affirmative defenses. But that is not the fact pattern that we have here.

13. Under the circumstances of this case, where AT&T has not followed the dispute resolution provisions in the ICA – the same adherence to the dispute resolution provisions that AT&T demands of Nexus – AT&T is estopped from now contesting the underlying eligibility and/or qualification of Nexus’ requests. Because AT&T is estopped from challenging the eligibility of promotional credit requests, AT&T Data Requests 7, 8, and 9 are irrelevant and not calculated to lead to the discovery of admissible evidence.

same requests. Furthermore, AT&T has been in receipt of all relevant information regarding each and every one of the 15,634 promotional credit disputes – as this material was provided by Nexus in the very manner and via the proprietary web portal system that AT&T itself prescribed – since December 13, 2010.

⁶ Other requests for promotional credit exist in which Nexus applied but was denied; however, Nexus has focused this case on the issue of how much credit should be extended for those requests where eligibility was not disputed precisely to avoid a protracted and detailed case examining the eligibility of each individual request.

B. Because Nexus' complaint does not raise eligibility issues, discovery on such issues is irrelevant and inappropriate.

14. As discussed above, careful reading of Nexus' *First Amended Complaint* shows the dispute as being over of the *amount* due when a promotional credit *is* due. In any event, Nexus' *Second Amended Complaint* removes all doubt as to whether AT&T approved and deemed valid those promotional credit requests – promotional credit requests that AT&T ultimately credited Nexus, but at the wrong (improperly reduced) amount. Thus, the issue to be considered by the Commission is *not* a question of eligibility, but rather a question of *how much* is due Nexus *when a promotional credit request has been approved and deemed eligible by AT&T.*

15. Because Nexus does not seek relief regarding any promotional credits where the underlying eligibility has been disputed under the contract, AT&T Data Requests 7, 8, and 9 are irrelevant and not calculated to lead to the discovery of admissible evidence. Therefore, Nexus respectfully moves the Commission to reconsider its *Order* and modify same to deny AT&T's *Motion* on all counts.

III. CONCLUSION AND PRAYER

16. Nexus' pleadings do not raise any question regarding the eligibility and/or qualification for any cash back promotional credit requests now at issue in this case. In fact, Nexus specifically limited its complaint and relief requested to only those 15,634 promotional credit requests which AT&T approved, deemed eligible, and credited Nexus an amount on same. Nexus only seeks relief from the Commission with respect to *how much is due* Nexus when a promotional credit request has been approved and deemed eligible by AT&T. No other promotional credit requests are currently being disputed by Nexus before the Commission.

17. Furthermore, AT&T is estopped from challenging the eligibility of the underlying promotions in this case because it failed to timely dispute the eligibility of the promotional credit requests at issue and has not satisfied the dispute resolution provisions of the parties' ICA. Accordingly, it is barred for circumventing those provisions here.

18. For these reasons, a re-examination of the eligibility of Nexus' promotional credit requests are clearly outside the scope of the issue now before the Commission, and AT&T Data Requests 7, 8, and 9 are irrelevant and not calculated to lead to the discovery of admissible evidence. Therefore, Nexus respectfully moves the Commission to reconsider its *Order* and modify same to deny AT&T's *Motion* on all counts

Respectfully submitted,

s/ Chris Malish

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above instrument was transmitted and served to each of the below by e-mail on this 13th day of July, 2011.

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s/ Chris Malish
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PROPOSED ORDER

Issue Date: _____ Effective Date: _____

Before the Missouri Public Service Commission (“Commission”) is Southwestern Bell Telephone Co. d/b/a AT&T Missouri (“AT&T Missouri”)’s *Motion to Compel Responses to Data Requests Directed to Nexus Communications, Inc.*(“*Motion*”). Having considered the *Motion*, *Nexus Communication, Inc.’s Response to AT&T Missouri’s Motion to Compel*, and *AT&T Missouri’s Reply to Nexus’ Response to AT&T Missouri’s Motion to Compel*, the Commission hereby **DENIES** the *Motion*.

Signed this _____ day of _____, 2011.
