

STATE OF MISSOURI
MISSOURI PUBLIC SERVICE COMMISSION

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|--|---|--------------------------------|
| 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' OBJECTIONS TO AT&T'S FIRST SET OF REQUESTS FOR ADMISSION
AND SECOND SET OF DATA REQUESTS**

TO: Southwestern Bell Telephone Co. d/b/a AT&T Missouri, by and through its attorney of record, Robert Gryzmala, One AT&T Center, Room 3516, St. Louis, Missouri 63101.

COMES NOW Complainant Nexus Communications, Inc. and serves these objections to Southwestern Bell Telephone Co. d/b/a AT&T Missouri's ("AT&T") First Set of Requests for Admission and Second Set of Data Requests as shown on the following pages.

Respectfully submitted,

s/ Chris Malish
Christopher Malish (Texas Bar No. 00791164)
Admitted *pro hac vice* in Missouri

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Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above instrument was transmitted to Counsel for Respondent at the below address via electronic mail on August 1, 2011.

Robert Gryzmala
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s/ Chris Malish
Christopher Malish

**NEXUS' OBJECTIONS TO AT&T'S FIRST SET OF REQUESTS FOR ADMISSION
AND SECOND SET OF DATA REQUESTS**

RFA No. 1-1:

Admit or deny that the average (or median) subscriber tenure for Nexus customers exceeds five months.

RESPONSE:

Objection.

This request is irrelevant and not reasonably calculated to the lead to the discovery of admissible evidence.

The "average (or median) subscriber tenure" of Nexus customers is not at issue nor reasonably related to the question presented by Nexus in filing this case, *i.e.*, what amount should be paid at wholesale for a cash back promotion for that single first month in which it is undisputed that the underlying order for telecommunications services does qualify for the promotion.

By definition, the cash back promotions are payable for customers who maintain service for only 30 days; *there is no requirement for a longer service period*. Accordingly, service life beyond 30 days is purely speculative and has no legal relevance to whether an end user meets the written eligibility requirements of the promotions.

The question is, therefore, what the wholesale price for the service should be for that single first month to which the cash back promotion applies. There is no dispute regarding pricing for other months in which no cash back promotion applies.

For the above-listed objections, the probative value of the information requested is zero, and thus the burden of responding obviously exceeds the zero probative value of the information requested.

Nexus admits that the average or median subscriber maintains service with Nexus for more than 30 days.

RFA No. 1-3:

Admit or deny that the price of every Nexus Communications, Inc. service exceeds \$0 (for one-time charges) or \$0 per month (for on-going services).

RESPONSE:

Objection. This request is irrelevant and not reasonably calculated to the lead to the discovery of admissible evidence. The price for services charged *by Nexus to third parties (its customers)* is not at issue and not reasonably related to the question presented by Nexus in filing its case with the Commission, *i.e.*, what amount should be paid at wholesale for a cash back

promotion where it is undisputed that the underlying order for telecommunications services does qualify for the promotion.

The Commission has already ruled in its *Order Granting in Part, and Denying in Part, AT&T's Motion to Compel* that the Federal Telecommunications Act of 1996 expresses Congress' policy decision that relations between Nexus and its customers (which includes pricing) should be left to Nexus and its customers, and further that such data requests do not relate to any claim or defense and therefore, are not reasonably calculated to lead to the discovery of admissible evidence.¹

In the instant matter, the issue before the Commission is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like Nexus the same offers AT&T makes to its retail customers at the effective retail rate less avoided costs.*

The information sought by AT&T (information about Nexus' relations with *third parties*) is not relevant, since it inquires about issues that are not of consequence to the determination of whether *AT&T* has made the same offer it extends to *AT&T's retail customers* available to Nexus and whether it has done so at the effective retail rate less avoided costs.

The FCC rules on resale are found in the Code of Federal Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

47 CFR § 51.605. Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates. . . .

(e) Except as provided in §51.613 [relating to cross-class selling and short term promotions], *an incumbent LEC shall not impose restrictions on the resale* by a requesting carrier of telecommunications services offered by the incumbent LEC.

47 C.F.R. § 51.607. Wholesale pricing standard.

The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, less avoided retail costs, as described in section 51.609.

47 C.F.R. § 51.613. Restrictions on resale.

(a)(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

- (i) Such promotions involve rates that will be in effect for no more than 90 days; and

¹ *Order Granting in Part, and Denying in Part, AT&T's Motion to Compel*, issued July 6, 2011, pp. 5-6.

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

Accordingly, the only information relevant to determining whether AT&T has met its obligations under the FTA and FCC's rules is:

- (1) the terms and conditions under which AT&T makes certain offers to its retail customers;
- (2) whether AT&T makes the same offers available to resellers, like Nexus; and
- (3) if AT&T makes the same offers available to resellers, whether it does so at "the [effective retail] rate for the telecommunications service, less avoided retail costs."

However, the information sought by AT&T is information not related to the terms and conditions under which AT&T provides service to its retail customers, or to whether AT&T makes its retail offers available to resellers. Instead, AT&T seeks information about *Nexus' interactions with third parties* – Nexus's customers, which is utterly irrelevant and inadmissible in this case.

Because it is irrelevant, the probative value of the information requested is zero, and thus the burden of producing the material obviously exceeds the zero probative value of the information requested.

RFA No. 1-4:

Admit or deny that Nexus Communications, Inc. does not offer lower prices or a cash back to customers for whom Nexus requests or receives a cash back credit from AT&T.

RESPONSE:

Objection.

This request is irrelevant and not reasonably calculated to the lead to the discovery of admissible evidence. The price for services charged *by Nexus to third parties (its customers)* is not at issue and not reasonably related to the question presented by Nexus in filing its case with the Commission, *i.e.*, what amount should be paid at wholesale for a cash back promotion where it is undisputed that the underlying order for telecommunications services does qualify for the promotion.

The Commission has already ruled in its *Order Granting in Part, and Denying in Part, AT&T's Motion to Compel* that the Federal Telecommunications Act of 1996 expresses Congress' policy decision that relations between Nexus and its customers (which includes pricing) should be left to Nexus and its customers, and further that such data requests do not

relate to any claim or defense and therefore, are not reasonably calculated to lead to the discovery of admissible evidence.²

In the instant matter, the issue before the Commission is *whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like Nexus the same offers AT&T makes to its retail customers at the effective retail rate less avoided costs.*

The information sought by AT&T (information about Nexus' relations with *third parties*) is not relevant, since it inquires about issues that are not of consequence to the determination of whether *AT&T* has made the same offer it extends to *AT&T's retail customers* available to Nexus and whether it has done so at the effective retail rate less avoided costs.

The FCC rules on resale are found in the Code of Federal Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

47 CFR § 51.605. Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall *offer* to any requesting telecommunications carrier any telecommunications service that the incumbent LEC *offers* on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates. . . .

(e) Except as provided in §51.613 [relating to cross-class selling and short term promotions], *an incumbent LEC shall not impose restrictions on the resale* by a requesting carrier of telecommunications services offered by the incumbent LEC.

47 C.F.R. § 51.607. Wholesale pricing standard.

The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, less avoided retail costs, as described in section 51.609.

47 C.F.R. § 51.613. Restrictions on resale.

(a)(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(i) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

Accordingly, the only information relevant to determining whether AT&T has met its obligations under the FTA and FCC's rules is:

² Order Granting in Part, and Denying in Part, AT&T's Motion to Compel, issued July 6, 2011, pp. 5-6.

- (1) the terms and conditions under which AT&T makes certain offers to its retail customers;
- (2) whether AT&T makes the same offers available to resellers, like Nexus; and
- (3) if AT&T makes the same offers available to resellers, whether it does so at “the [effective retail] rate for the telecommunications service, less avoided retail costs.”

However, the information sought by AT&T is information not related to the terms and conditions under which AT&T provides service to its retail customers, or to whether AT&T makes its retail offers available to resellers. Instead, AT&T seeks information about *Nexus’ interactions with third parties* – Nexus’s customers, which is utterly irrelevant and inadmissible in this case.

Because it is irrelevant, the probative value of the information requested is zero, and thus the burden of producing the material obviously exceeds the zero probative value of the information requested.

RFA No. 1-14:

For the relevant cash back promotions in Missouri, admit or deny that the following formula results in a wholesale discount for resold telecommunications services that is greater than 19.2% of the effective retail rate, averaged over two or more months of service, where “effective retail rate” equals “ordinary retail rate” minus “cash back promotion.”

Wholesale promotional rate = $[(1.0 - 0.216) \times (\text{ordinary retail rate})] - (\text{cash back promotion})$.

RESPONSE:

Objection.

This request is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

The “average (or median) subscriber tenure” of Nexus customers is not at issue nor reasonably related to the question presented by Nexus in filing this case, *i.e.*, what amount should be paid at wholesale for a cash back promotion for that single first month in which it is undisputed that the underlying order for telecommunications services does qualify for the promotion.

By definition, the cash back promotions are payable for customers who maintain service for only 30 days; *there is no requirement for a longer service period*. Accordingly, service life beyond 30 days is purely speculative and has no legal relevance to whether an end user meets the written eligibility requirements of the promotions.

The question is, therefore, what the wholesale price for the service should be for that single first month to which the cash back promotion applies. There is no dispute regarding pricing for other months in which no cash back promotion applies.

For the above-listed reasons, the probative value of the information requested is zero, and thus the burden of responding obviously exceeds the zero probative value of the information requested.