

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 RESPONSE TO
AT&T'S MOTION TO STAY

On July 21, 2011, -- 258 days after this case was filed; 220 days after Nexus' formal dispute resolution documentation was filed; 20 days after Nexus' initial testimony was filed; 13 days after the parties agreed to a revised procedural schedule; and six days after the initial July 15 deadline for filing for an order referring this case to alternative dispute resolution -- AT&T filed a motion requesting this Commission to stay this case until after Nexus complied with the dispute resolution requirements of the interconnection agreement.

This motion is audacious for its utter lack of merit.

Nexus long ago complied with the key provisions of the dispute resolution provisions of the contract by identifying the orders the subject of dispute and reason for the dispute, and has taken the process of negotiating AT&T and Nexus' differences on this matter to impasse -- necessitating the filing of this case in the first instance. A stay at this point would serve no purpose but to delay Nexus' access to justice.

**ANALYSIS: STAYING THIS CASE TO ALLOW FURTHER NEGOTIATION
BETWEEN THE PARTIES WILL BE AN EXERCISE IN FUTILITY**

Pursuant to their ICA, the parties are required to employ a detailed dispute resolution process for identifying charges and credits they wish to dispute with one another. This dispute resolution process requires AT&T and Nexus to identify charges or credits challenged by:

- Record type;
- Claim type;
- Account identification;
- Billing date;
- Customer claim number;
- Amount requested;
- Customer comments (this is where an explanation of the reason for the dispute goes); and
- Circuit identification/actual telephone number to which the promotion credit applies.

Nexus initiated informal dispute resolution with AT&T on the issue central to this case in the fall of 2010. Most importantly, by December 13, 2010, Nexus had made the formal filings referenced above with AT&T (as noted most recently in Nexus' Second Amended Complaint at p. 6, and Exhibit D to the *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.*) including 28 spreadsheets containing the raw data detailing the 15,634 promotional credit requests submitted via AT&T's web portal system for the promotional credits at issue in this dispute which were approved, but underpaid.¹ Nexus cannot emphasize strongly enough that

¹ In disputing AT&T's underpayment of the approved promotion credits, Nexus provided all the information AT&T's dispute processing system required for the identification of each and every promotional credit request, such as:

- Record type;

AT&T already approved and deemed valid each and every promotional credit request now before the Commission; however, AT&T improperly discounted the full face value of the promotions and credited Nexus with a reduced amount. AT&T has been in receipt of all relevant information regarding the promotional credit disputes as this material was provided by Nexus – in the very manner and via the proprietary web portal system that AT&T themselves prescribed – since December 13, 2010. For each and every one of these orders, the key dispute between the parties is how to calculate the proper amount due a qualifying reseller, such as Nexus, for valid promotional credit requests.

AT&T contends that it should not be required to extend to CLECs the entire amount of the promotion, but rather a lesser amount derived by reducing the promotional amount by the wholesale discount. AT&T's contention is incorrect and incompatible with the requirements of the Act, violates federal law, and harms competition. To comply with the law, the Commission should require AT&T to provide the full amount of the cash back promotion to Nexus and all other CLECs.

Nexus has made an attempt at informal dispute resolution by teleconference with between counsel for Nexus and AT&T at a high level. However, AT&T has been firm on its refusal to offer the full face value of its cash back promotions to Nexus and other CLECs since at least 2006.²

-
- Claim type;
 - Account identification;
 - Billing date;
 - Customer claim number;
 - Amount requested;
 - Customer comments (which are limited by AT&T's system to 256 characters, including spaces); and
 - Circuit identification/actual telephone number to which the promotion credit applies.

² See *In the Matter of: Petition of Image Access, Inc. d/b/a New Phone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as*

Past experience in attempting to negotiate this issue on behalf of other, but identically situated CLECs, counsel for Nexus knows that “negotiation” of the core issue in this case is futile: the instant matter before the Commission is only one out of 12 cases in jurisdictions that are ongoing or pending between the Nexus and AT&T regarding identical claims.

Moreover, AT&T has for many months been involved in litigation in approximately 12 other substantively identical pending cases in various jurisdictions, including before the Commission, with a number of other CLECs similar to Nexus.³ Counsel for Nexus represents other CLECs in many of these cases, some of which are in jurisdictions which require an attempt at informal dispute resolution prior to bringing a formal complaint. However, these cases exist precisely because AT&T and CLECs cannot agree on the resolution of the polarizing issue now before the Commission – namely, the promotional credits that are due Nexus from AT&T as a result of Nexus reselling AT&T telecommunications services subject to “cash back” promotions offered at retail. Thus, further negotiation at this stage is futile not only because AT&T cannot compromise its position with Nexus in Missouri and the other cases between the parties, but also because AT&T cannot compromise in Missouri without adversely affecting AT&T’s overall litigation stance in the other ongoing cases that it has itself filed and been pursuing with a number of other CLECs for many months.

Amended, and Sections 51.601 et seq. of the Commission’s Rules; WC Docket No. 06-129 before the Federal Communications Commission.

³ See also e.g., *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi Teleconnect, LLC*, Docket No. 31323 before the Alabama Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. dPi Teleconnect, LLC*, Consolidated Docket No. U-31364 before the Louisiana Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina v. dPi Teleconnect, LLC*, Docket No. P-836, Sub 5 before the North Carolina Utilities Commission; and *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC*, Docket No. 2010-18-C before the Public Service Commission of South Carolina. These cases also involve Competitive Acquisition and Movers cash back promotions which are substantively identical to those in this case.

In fact, AT&T has repeatedly admitted on the record that AT&T's position and the CLEC position (which Nexus also espouses) on how to calculate the wholesale price for services subject to a cash back promotion are fundamentally irreconcilable, thereby necessitating commission intervention. For example, at a hearing before the Public Service Commission of South Carolina, counsel for AT&T affirmatively stated:

Right now the resellers are folding their arms and saying, "We are right on the law." Frankly, we're folding our arms and saying, "We are right on the law." And there's no negotiation on the past-due billing because of that, and we need your guidance to break that logjam.⁴

Because AT&T cannot compromise its position, Nexus should be excused from performing such a futile act as attempting to get AT&T to do so. In such situations, it is black-letter law that performance of a condition precedent otherwise required by contract is excused where such performance would be a futile act.⁵ The rule in Missouri is no different:

One who hinders performance by the other party may not avail himself of the nonperformance which he induced or occasioned. *See* 17A C.J.S. Contracts s 468, p. 645, wherein it is stated: "*** and, where he prevents, hinders, or renders impossible the fulfillment of a condition precedent or

⁴ *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC*, Consolidated Docket Nos. 2010-14-C ~19-C before the Public Service Commission of South Carolina, Hearing #10-11166, p. 24, lines 4-11, (P.S.C.S.C. December 16, 2010) (from opening statements by AT&T attorney, Mr. Patrick Turner).

See also BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi Teleconnect, LLC, Docket No. 31323 before the Alabama Public Service Commission, (Hearing transcript, p. 44, lines 11-16, (A.P.S.C. January 21, 2011) (from opening statements by AT&T attorney, Mr. Patrick Turner):

[W]e've got a log jam that's building every day. We need to break it. We need to end this vicious cycle on going forward basis so we know the rules going forward. . . .;

and

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al., Consolidated Docket No. U-31364 before the Louisiana Public Service Commission, Hearing transcript, p. 14, lines 3-7, (L.P.S.C. November 4, 2010) (from opening statements by AT&T attorney, Mr. Patrick Turner):

Once we understand what the ground rules are, there's probably some opening for some good negotiations. But today, both sides are saying, "I'm right on the Law." And no one's moving off the (INAUDIBLE). So we need that ruling. We also need it to end this vicious cycle of continuing disputes. . . .

⁵ Samuel Williston, *Williston on Contracts* § 47:4 (4th ed.).

its performance by the adverse party, or is himself the cause of failure to perform the condition he cannot rely on such condition to defeat his liability.'

Hillis v. Blanchard, 433 S.W.2d 276, 279 (Mo. 1968). *Kreitz v. Egelhoff*, 231 Mo. 694, 132 S.W. 1124, 1127 (Mo. 1910) ("[I]f defendants wrongfully prevented full performance, they may claim nothing by virtue of so much of the nonperformance as was brought about by their own wrongful act."). The North Carolina Utilities Commission has said much the same thing about enforcing informal dispute resolution provisions under circumstances like those we have here:

We believe that the purpose of the escalation provision was to permit the parties, in good faith, to attempt to resolve disputes prior to resorting to a forum such as this Commission. To be effective, each party has to be open to a negotiated resolution of a disputed issue. Here, because of the unyielding position taken by [AT&T], there could be no negotiated resolution. [AT&T's] position was that these cashback promotions were not available for resale. No matter how many times dPi asked [AT&T], the answer would always be the same: denial, because "AT&T did not offer cashback promotions for resale." (Tr. P. 165) Thus, any action taken by dPi to comply with the escalation process would have been futile. dPi's nonperformance in this regard is therefore deemed to have been excused.⁶

Because AT&T cannot compromise AT&T's position in Missouri with Nexus without adversely affecting AT&T's litigation stance in the many other pending cases, further informal dispute resolution in this case is doomed. Therefore, the Commission should conclude that further negotiation under the dispute resolution provisions is futile and allow the case to proceed.

Finally, AT&T argued in Nexus and AT&T's sister case in Texas⁷ that the matter should be stayed pending "informal dispute resolution." Although Nexus pointed out the absurdity of attempting informal dispute resolution under the circumstances, the case was nevertheless stayed

⁶ Recommended Order, *In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent*, 2010 WL 1922679, *1922679 (N.C.U.C. May 07, 2010) (No. P-55, SUB 1744).

⁷ *Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company d/b/a AT&T Texas Under FTA Relating to Recovery of Promotional Credit Due*; Docket No. 39028, before the Public Utility Commission of Texas

for 168 days – from January 14, 2011, to July 1, 2011 – during which absolutely no progress was made, no new ideas exchanged, and nothing occurred but the delay itself.

All of these things show that AT&T's request for a stay is not made in good faith for the purposes of furthering informal resolution of disputes, but for the sake of delay itself. Based upon the foregoing, Nexus respectfully requests and prays the Missouri Public Service Commission deny AT&T's Motion to Stay.

Respectfully submitted,

s/ Chris Malish

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

Malish & Cowan, P.L.L.C.
1403 West Sixth Street
Austin, Texas 78703
(512) 476-8591
(512) 477-8657 – facsimile
cmalish@malishcowan.com

Mark W. Comley #28847
Newman, Comley & Ruth, P.C.
P.O. Box 537
Jefferson City, Missouri 65102-0537
(573) 634-2266, ext. 301
(573) 636-3306 – facsimile
comleym@ncrpc.com

Attorneys for Complainant

CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of the foregoing Second Amended Complaint was served by electronic mail this 1st day of August, 2011, to:

General Counsel's Office at gencounsel@psc.mo.gov;
Office of Public Counsel at opcservice@ded.mo.gov;
Cully Dale at cully.dale@psc.mo.gov;
William Voight at william.voight@psc.mo.gov; and
AT&T Missouri at robert.grysmala@att.com and leo.bub@att.com.

s/ Chris Malish
Christopher Malish