BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Nexus Communications, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. TC-2011-0132
	)	
Southwestern Bell Telephone Company, d/b/a AT&T Missouri,	)	
	)	
Respondent.	)	

RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T MISSOURI TO NEXUS COMMUNICATIONS, INC.'S MOTION TO RECONSIDER ORDER GRANTING IN PART, AND DENYING IN PART, AT&T'S MOTION TO COMPEL NEXUS TO RESPOND TO DISCOVERY

COMES NOW Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri") and respectfully submits this Response to Nexus Communications, Inc.'s ("Nexus") July 13 Motion to Reconsider the Commission's July 6 Order Granting in Part, and Denying in Part, AT&T Missouri's Motion to Compel Nexus to Respond to Discovery ("Discovery Order").

SUMMARY

For the reasons explained below, Nexus' motion should be denied. The Commission's Discovery Order rests on a solid and well-reasoned foundation, and it correctly directed Nexus to respond to AT&T Missouri's "Customer Qualification" Data Requests (DRs 7 through 9). The first holding of the Discovery Order – that Nexus' Complaint and AT&T Missouri's Answer and Affirmative Defenses, when considered *as a whole*, make customer qualification an issue in the case – is not undermined by Nexus' motion. Equally important, the Commission's independent holding – that AT&T Missouri's discovery was relevant even if one were to look only to Nexus' complaint *standing alone* – is not undercut by Nexus' motion. Nexus' motion brings no new

circumstance to the attention of the Commission, save for a new legal theory ("estoppel") that wholly lacks any proper factual or legal support.

DISCUSSION

The Discovery Order rested its analysis on two separate and distinct grounds. The first viewed the pleadings *as a whole* -- correctly finding that Nexus' and AT&T Missouri's "pleadings frame the issues[,]" Discovery Order, at 3 -- and on this basis proceeded to determine the relevance of AT&T Missouri's discovery. Thus, while the Commission observed that it was Nexus' *assertion* that "AT&T [Missouri] has already acknowledged that the sales qualify [for credits]," the Commission correctly recognized both (1) that AT&T Missouri had denied the assertion and (2) that AT&T Missouri had lodged an affirmative defense to Nexus' Complaint, asserting a bar to relief to the extent that Nexus' end users failed to qualify or be eligible for the benefits of the promotions at issue.

The fact that Nexus' motion merely repeats Nexus' earlier assertion that AT&T Missouri "has already approved" the orders on which Nexus seeks recovery (Motion, at 1) does not support reconsideration. The Commission's Discovery Order properly noted both Nexus' assertion and the denial reflected in AT&T Missouri's Answer. See, Discovery Order, at 3-4, fns. 9, 10.

Furthermore, Nexus' new theory, that AT&T Missouri is "estopped" from raising its affirmative defense because it allegedly did not invoke the ICA's dispute resolution process regarding the matter (Nexus' Motion, at 6), is without merit. It is settled law that prejudice is an element of a plea of estoppel. Brown v. State Farm Mutual Automobile Insurance Company, 776 S.W. 2d 384, 388 (Mo. en banc 1989). The one claiming estoppel must have suffered some

"injury" by having "relied to his detriment" on the other's conduct. *Id*., at 389. Nexus has not provided any facts or other evidence to support its new claim of estoppel.

AT&T Missouri affirmatively attempted to elicit Nexus' cooperation in achieving a resolution on an informal, business-to-business, basis. As the Commission will recall, in December, 2010, AT&T Missouri sent a letter to Nexus' President, spelling out in detail its concerns underlying the affirmative defense it has since raised to Nexus' complaint. In that letter, AT&T Missouri specifically sought "resolution of those concerns." *See*, AT&T Missouri's May 27 Motion to Compel Responses to Data Requests Directed to Nexus, Exhibit B. AT&T Missouri maintains that "[t]hese circumstances demonstrate substantial compliance on AT&T Missouri's part insofar as any dispute resolution obligation is concerned, and it cannot be faulted for Nexus' own decision to not reciprocate by ignoring AT&T Missouri's efforts to reach a resolution." *See*, AT&T Missouri's June 23 Reply in Support of its Motion to Compel Responses to Data Requests Directed to Nexus, at 4.

Given these circumstances, even assuming (as Nexus argues) that AT&T Missouri had not demonstrated substantial compliance with the ICA's dispute resolution proceedings, AT&T Missouri would not be "estopped from challenging the eligibility of promotional credit requests." Nexus' Motion, at 6. Though the law requires it to do so, Nexus cannot show any reliance on the ICA's dispute resolution process or any prejudice or injury by having ostensibly been deprived of it. AT&T Missouri's December, 2010, letter already afforded Nexus ample opportunity to resolve the matter by participating in such a process. Yet, for reasons only it knows and has steadfastly declined to provide, Nexus decided to decline to participate in any such effort. Consequently, the Commission has no basis on which to conclude that Nexus was effectively denied an opportunity to resolve the matter of whether all of its orders were qualified for the

promotions as a result of AT&T Missouri's alleged failure to comply with the ICA's dispute resolution.

Nexus' motion also overlooks the independent ground on which the Discovery Order rested its analysis, wherein the Commission viewed Nexus' complaint *standing alone*. As the Discovery Order noted,

> Further, even if we looked only to the complaint, we would find the issue that AT&T [Missouri] raises. As AT&T [Missouri] notes, Nexus's prayer for relief expressly seeks more than merely a declaration on how the formula works. Nexus asks the Commission for an order: . . . that Nexus is entitled to recover all underpaid promotional credits due. Nexus has thus already raised the issue of whether credits are due. An order to pay credits not due would be an absurd and unlawful result." Discovery Order, at 4-5. (emphasis added).

Nexus' proposed second amended complaint is no better because it, like Nexus' first amended complaint, "seeks more than merely a declaration on how the formula works." Specifically, it requests that the Commission "[i]ssue a ruling such that Nexus is entitled to recover all underpaid amounts for promotional credits already approved and deemed valid by AT&T [Missouri]; and [a]ward Nexus any other such relief as it is entitled to in law and equity." (emphasis added). Moreover, its mere recital that the credits were approved and deemed valid by AT&T Missouri does not alter the fact that an issue remains between the parties regarding whether AT&T Missouri approved or deemed valid all of the orders for which Nexus claims recovery. Consequently, Nexus has again "raised the issue of whether credits are due." *Id.*, at 5.

CONCLUSION

For the foregoing reasons, AT&T Missouri respectfully submits that Nexus' Motion to Reconsider should be denied in all respects.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

BY 

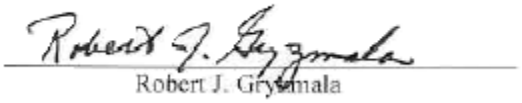
JEFFREY E. LEWIS #62389
LEO J. BUB #34326
ROBERT J. GRYZMALA #32454

One AT&T Center, Room 3516
St. Louis, Missouri 63101
(314) 235-6060
(314) 247-0014 (Fax)
robert.gryzmala@att.com

Attorneys for Southwestern Bell Telephone Company,
d/b/a AT&T Missouri

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to each of the below by e-mail on July 21, 2011.


Robert J. Gryzmala

General Counsel
Kevin Thompson
Colleen M. Dale
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
gencounsel@psc.mo.gov
kevin.thompson@psc.mo.gov
cully.dale@psc.mo.gov

Public Counsel
Office Of The Public Counsel
P.O. Box 7800
Jefferson City, MO 65102
opcservice@ded.mo.gov

Christopher Malish
Malish & Cowan
1403 West Sixth Street
Austin, TX 78703
cmalish@malishcowan.com

Mark W. Comley
Newman, Conley & Ruth, PC
601 Monroe St., Suite 301
Jefferson City, MO 65102
comleym@ncrpc.com