

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 MISSOURI'S MOTION TO COMPEL

COMES NOW Nexus Communications, Inc. ("Nexus") and files this response to 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")*. AT&T Missouri's Data Requests 7, 8, 9,13, 14, and 15 are objectionable because they are irrelevant and not calculated to lead to the discovery of admissible evidence.

I. BACKGROUND

1. Nexus carefully framed its complaint to present the Missouri Public Service Commission ("Commission") with the narrow legal and policy question: "what is the formula that should be used to calculate the wholesale price for services subject to cash back promotions?" AT&T Missouri's discovery requests are irrelevant to the issue to be decided in the case as it is currently framed. However, AT&T Missouri appears to wish to shanghai this proceeding and turn it into a painstaking examination of the underlying bases for each of the

15,634 separate credit requests. While AT&T Missouri may be able to bring a case disputing the eligibility of particular individual orders and seeking to claw back credits previously given, it cannot do so in this case: it must first pursue the detailed dispute resolution provisions in the parties' contract and identify to Nexus the particular orders it retroactively seeks to contest. That will take months to complete. The Commission should not let AT&T Missouri derail and divert the resources of the Commission on that issue in this docket; if AT&T Missouri wishes to pursue such a dispute matter, it should do so in a different docket following its own track, and only after AT&T Missouri has followed the dispute resolution provisions contained in the interconnection agreement.

2. This case arises because Nexus has alleged that in situations where Nexus applied and qualified to resell certain cash back promotions, and where AT&T Missouri approved and credited Nexus for those promotions, AT&T Missouri as a matter of course under-credited \$9.60 Nexus in each and every instance by reducing the amount of the cash back credit by the Commission's wholesale discount percentage.¹ So the question presented to the Commission is a largely a legal and policy question: "what is the formula that should be used to calculate the wholesale for services subject to cash back promotions?"

¹ Nexus attached to its Amended Complaint Exhibit D which provides 28 spreadsheets containing the raw data detailing the 15,634 promotional credit requests submitted via AT&T Missouri's web portal system for the underpaid promotional credits at issue in this dispute. Again, please note these are for orders in which AT&T Missouri has *already approved* each and every one of the promotional credit requests, but only disputes the amount due qualifying reseller orders under the promotions at issue. In using AT&T Missouri's system to request the promotional credits, Nexus provided all the information AT&T Missouri's system required for the identification of each and every promotional credit request, such as:

- Record type;
- 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 space); and
- Circuit identification/actual telephone number to which the promotion credit applies.

3. In framing its complaint, Nexus purposefully restricted its claims to those instances in which AT&T Missouri had agreed that Nexus was due a credit, but had issued a credit *amount* with which Nexus disagreed. So the issue was not whether Nexus was eligible for the promotion, but what pricing should have been given for the promotions in which Nexus *was* eligible. Nexus so framed its complaint precisely to keep this proceeding as streamlined as possible.

4. Nexus' claim is thus based on some 15,634 orders for which AT&T Missouri had issued credit, indicating that eligibility was not contested, but for which AT&T Missouri routinely issued a credit that was the Commission's wholesale discount percentage less than the amount of the credit that Nexus was entitled to. There are many more orders for which Nexus submitted credit requests which were rejected, but Nexus chose not make those a part of this complaint in order to keep the inquiry in this case narrowly tailored and to avoid overcomplicating and overburdening this proceeding.

II. NEXUS' OBJECTIONS TO DATA REQUESTS 7, 8, AND 9

5. In Data Requests 7, 8, and 9, AT&T Missouri seeks 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. (*Motion* at ¶2). Such discovery is improper in this case because it is not relevant to the issue in the case as it is currently framed. Essentially, AT&T Missouri improperly seeks to turn this case from a determination on the single question of what the proper formula should be when calculating the wholesale price of services subject to long term promotions into a contested case on the details of each of the previously approved underlying 15,634 separate credit requests. However, AT&T Missouri cannot do so at this time: AT&T Missouri is circumventing the dispute resolution provisions in

the parties' contract, which require a party disputing an issue to identify with particularity each order/charge which the disputing party objects to, along with the reasons why the charge is improper. If AT&T Missouri wishes to pursue such a case, it must first follow the detailed dispute resolution provisions in the parties' contract and identify to Nexus the particular orders it retroactively seeks to contest, and the reasons why it now seeks to retract its approval of the credits. Because that will take weeks and perhaps months to complete, the Commission should not let AT&T Missouri derail and divert the resources of the Commission on that issue in this docket. Instead, if AT&T Missouri wishes to pursue such a dispute, it should be required to do so in a different docket following its own track, and then only after AT&T Missouri has followed the dispute resolution provisions contained in the interconnection agreement.

6. Accordingly, the discovery should not be permitted because the burden of the discovery outweighs its likely benefit in this particular case, considering the needs of the case, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues currently presented.

7. AT&T Missouri also argues that it is entitled to the discovery sought to verify Nexus' statement that Nexus has brought claims restricted to instances where AT&T Missouri has already granted credit, albeit at an improperly reduced amount. Nexus agrees that AT&T Missouri is entitled to discovery testing this contention; however, the appropriate discovery request for testing such a contention is not the overbroad question actually submitted; a proper request would be something similar to: "identify each instance in which Nexus claims that AT&T Missouri issued a promotion credit which Nexus claims was improperly reduced by the wholesale discount." AT&T Missouri could then check its own records to verify that it had in fact approved the credit. In fact, Nexus has presented just such information in its Amended

Petition, with its attachments, which identify down to the telephone level of detail the 15,634 orders which AT&T Missouri granted an improperly reduced promotion credit.

III. NEXUS' OBJECTIONS TO DATA REQUESTS 13, 14, AND 15

8. In Data Requests 13, 14, and 15, AT&T Missouri seeks information and documents relating generally to “[w]hether Nexus passed on to its retail customers the promotional credits AT&T Missouri has already provided to Nexus (and whether Nexus will pass on . . . any further credits [to its retail customers]).” (*Motion* at ¶3).

9. Nexus objects to Data Requests 13, 14, and 15 because the information sought – information about Nexus’ relationships with third parties -- is utterly irrelevant to the question at issue: the scope and execution of AT&T’ obligations to resellers. The material thus is not calculated to lead to the discovery of admissible evidence.

A. The Act and the FCC Rules Do Not Address How CLECs Must Treat Promotional Credits.

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

11. The information sought by AT&T Missouri in Data Requests 13, 14, and 15 – information about Nexus’ relations with third parties – is not relevant since it inquires about issues that are not of consequence to the determination whether AT&T Missouri has made the same offer it extends to its own retail customers also available to Nexus and whether it has done so at the effective retail rate less avoided costs.

12. In relevant part, the Act provides:

47 U.S.C. § 251(c)(4)(A).[An ILEC has the duty] to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

47 U.S.C. § 251(c)(4)(B). [An ILEC has the duty] not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service. . . .

47 U.S.C. § 252(d)(3). Wholesale prices for telecommunications services.

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

13. There is no provision in the Act that requires CLECs to pass through to its end users any promotional credit it receives from an ILEC.

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

47 C.F.R. § 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.

15. There is no provision in the FCC rules that requires CLECs to pass through to its end users any promotional credit it receives from an ILEC.

16. In fact, The North Carolina Utility Commission has addressed the very issue of whether a CLEC is obligated to pass through to its end users any benefits received from an ILEC and stated, “The resale obligation of [the Act] permits a [CLEC] to use the wholesale discount in a way that is beneficial to it *without requiring the benefit to be passed directly to end users....*” *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* Docket No. P-100, Sub 72b, Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay at 7, (N.C.U.C. June 3, 2005) (Emphasis added).

17. Accordingly, the only information *relevant* to determining whether AT&T Missouri has met its obligations under the Act and FCC’s rules is:

- (1) the terms and conditions under which AT&T Missouri makes certain offers to its retail customers;
- (2) whether AT&T Missouri makes the same offers available to resellers, like Nexus; and

- (3) if AT&T Missouri makes the same offers available to resellers, whether it does so at “the [effective retail] rate for the telecommunications service, less avoided retail costs.”

18. However, the information sought by AT&T Missouri is information *not related* to the terms and conditions under which AT&T Missouri provides service to its retail customers, or whether AT&T Missouri makes its retail offers available to resellers, and if so, whether it does so at the effective retail rate less avoided retail costs. Instead, AT&T Missouri seeks information about Nexus’ interactions with third parties – Nexus’ customers – which is utterly irrelevant and inadmissible in this case.

19. Because Data Requests 13, 14, and 15 are 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. Therefore, AT&T Missouri’s *Motion* should be denied.

B. Whether Nexus Passes Through Promotional Credits Received from AT&T Missouri Does Not Affect the Legal Meaning of the Act, the Relevant Portions of the FCC Rules, or the Cash Back Promotional Language.

20. Whether Nexus passes through promotional credits received from AT&T Missouri does not affect the legal meaning of the text of the Act, the relevant portions of the FCC rules, or the Cash Back promotional language. This is because Nexus’ relationship with its end users is in no way relevant to this inquiry before the Commission: AT&T Missouri’s obligations under the Act are not conditioned upon Nexus passing through any promotional credit it receives from AT&T Missouri.

21. Likewise, AT&T Missouri’s obligations under the relevant FCC Rules in the C.F.R. are not conditioned upon Nexus passing through any promotional credit it receives from AT&T Missouri.

22. Furthermore, AT&T Missouri's obligations under its own Cash Back promotion language are not conditional upon Nexus passing through any promotional credit it receives from AT&T Missouri.

23. Because the legal meaning of the text of the Act, the relevant portions of the FCC rules, or the Cash Back promotional language is not affected by whether Nexus passes through promotional credits received from AT&T Missouri to its end users, Data Requests 13, 14, and 15 are irrelevant. Because Data Requests 13, 14, and 15 are 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. Therefore, AT&T Missouri's *Motion* should be denied.

C. AT&T Missouri is Not Entitled to Nexus' Internal Business Processes or Operational Information.

24. The information relating to Nexus' internal business processes or operational information sought by AT&T Missouri in Data Requests 13, 14, and 15 is irrelevant since it inquires about issues that are not of consequence to the determination whether AT&T Missouri has made the same offer it extends to its own retail customers also available to Nexus and whether it has done so at the effective retail rate less avoided costs.

25. The Act is very clear: AT&T Missouri has a "duty *not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations* on, the resale of such telecommunications services." 47 U.S.C. § 251(c)(4)(B) (2009) (Emphasis added).

26. Clearly, requesting, much less compelling, Nexus to provide descriptions of its internal business processes imposes an unreasonable condition or limitation on the resale of telecommunications services. Furthermore, the compulsion of Nexus to provide AT&T Missouri descriptions of its internal business processes would amount to a discriminatory practice in that

AT&T Missouri will surely evaluate the processes and glean valuable business information that will likely lead to a competitive advantage.

27. Lest one forget, the purpose of the Act is to foster and encourage competition with ILECs like AT&T. In fact, United States Code Title 47, Chapter 5, Subchapter II, Part II, where the Act is codified, is entitled “Development of Competitive Markets.” Compelling Nexus to turn over its internal business processes and operational information will no doubt quell competition.

28. The FCC Rules are no less unambiguous. “Except as provided in §51.613, 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. § 51.605(e)(2010) (Emphasis added). It is unquestionable that were Nexus to be compelled to provide AT&T Missouri with its internal business processes, the result would not only be restrictive, it would likely lead to a competitive advantage for AT&T Missouri for the same reasons described above.

29. The purpose of Title 47 C.F.R. Part 51 (Interconnection) is “to implement sections 251 and 252 of the . . . Act.” 47 C.F.R. § 51.1(b) (2010). And as previously mentioned, the purpose of the Act is to foster and encourage competition. Notwithstanding the fact that AT&T Missouri’s Data Requests 13, 14, and 15 have nothing to do with the issue at hand – whether AT&T Missouri has made the same offer it extends to its own retail customers also available to Nexus and whether it has done so at the effective retail rate less avoided costs – responding to these data requests are contrary to the purpose and spirit of the Act and the FCC Rules developed to implement the Act. Therefore, AT&T Missouri’s *Motion* should be denied.

30. In any event, Nexus’ internal business processes and operational information are confidential, proprietary, and utterly irrelevant to the issue of whether AT&T Missouri properly

paid Nexus the full amount of each and every promotional credit requested. Furthermore, Nexus' internal business processes and operational information are not likely to lead to the discovery of admissible evidence regarding the issue of whether AT&T Missouri has complied with its obligations under the Act and FCC rules to offer reselling CLECs, like Nexus, the same offers AT&T Missouri makes to its retail customers at the effective retail rate less avoided costs.

31. Because the information sought is confidential, proprietary, and utterly irrelevant to the issue of whether AT&T Missouri properly paid Nexus the full amount of each and every promotional credit requested, AT&T Missouri's *Motion* should be denied.

WHEREFORE, the Nexus Communications, Inc. respectfully asks that AT&T Missouri's *Motion to Compel Responses to Data Requests Directed to Nexus Communications, Inc.* be denied.

Respectfully submitted,



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

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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 8 day of June, 2011.

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Christopher 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.
