

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.)	

REPLY TO RESPONSE OF SOUTHWESTERN BELL TELEPHONE CO. 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

1. AT&T continues to insist that it is allowed to convert this case into a re-examination of the eligibility of all 15,634 credit requests it initially approved – the litigation expense of which will quickly surpass the amount at issue in the case.
2. Nevertheless, AT&T cannot avoid its obligations under the parties' interconnection agreement, and cannot bring its claims challenging the underlying orders until those claims are first submitted through the dispute resolution processes set out by the ICA. Furthermore, principles of equity prohibit AT&T from now raising questions regarding eligibility where eligibility has never before been in question. Therefore, the Commission should reconsider its order compelling Nexus to respond to AT&T's discovery on eligibility issues.

II. ANALYSIS

A. Parties' Interconnection Agreement Proscribes AT&T From Asserting Eligibility As An Affirmative Defense in This Proceeding.

1. Parties' interconnection agreement identifies specific requirements necessary to initiate a billing dispute.
3. The parties have clearly agreed that "*No Party may pursue any claim unless* [the Dispute Resolution measures are followed.]" General Terms and Conditions, Section 10.3.1.¹ Among other things, in order to dispute a charge or credit, AT&T must provide at least the following information relating to the order at issue:
 - Billing date;
 - Account identification;

¹ 10. DISPUTE RESOLUTION

10.3 Commencing Dispute Resolution

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 interconnection agreement 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.

- Circuit identification/actual telephone number;
 - Any ordering code or other descriptive information;
 - Amount billed;
 - Amount requested; and
 - Reasons for the dispute.
4. Nexus adhered to this dispute resolution process by submitting detailed, electronic disputes using AT&T's proprietary web portal system for each and every one of the 15,634 promotional credit requests at issue in this case. On paper, these detailed disputes comprise 28 spreadsheets with more than 100,000 individual data points which Nexus included in its amended complaint.
5. AT&T now claims that it has likewise complied with the ICA's dispute resolution provisions regarding its claims for recovery of "improperly" granted credits. As evidence, AT&T points to a generic letter comprising approximately one page of text regarding "at least 12,925 claims for the Cash Back Rewards Promotion for Residential End Users ("Mover's Reward Promotion.")"²
6. Even a cursory glance at the letter shows irretrievably that it does not satisfy a single requirement mandated by the parties' interconnection agreement regarding dispute resolution procedures outlined above. In the generic letter, AT&T stated it "has serious *concerns*[not disputes] about the legitimacy of the claims [for the Mover's Reward Promotion] submitted by Nexus," although AT&T did not specify any particular state in which it had such concerns.³ Moreover, AT&T stated, "Nexus' *high percentage of*

² AT&T, *Letter re: questionable claims for mover's promotion*, December 8, 2010. A copy is attached as Exhibit B to AT&T's motion to compel.

³ *Id.* (Emphasis added).

claims for the Mover's Reward Promotion is a *primary reason* for our concern."⁴ Most importantly, not a single order was identified with any particularity allowing Nexus to review the order complained of so as to allow any meaningful analysis of AT&T's concern.⁵ Furthermore, AT&T's concerns seem to have no basis in reality, as Nexus only submitted 628 promotional data requests pursuant to the Mover's Reward Promotion in Missouri during the timeframe of AT&T's concern (January 1 to September 30, 2010) yet AT&T claims it is investigating "at least 12,925, claims...."

7. Ultimately, AT&T is barred by contract from raising claims regarding the eligibility of Nexus' underlying orders and associated promotional credit requests until it first submits them through the dispute resolution process for evaluation. However, AT&T's generic letter does not satisfy even a single dispute resolution requirement under the parties' agreement. Consequently, the Commission should reconsider its *Order* and deny AT&T's motion to compel on all counts.

B. Equity Prevents AT&T From Asserting Questions Regarding Eligibility As An Affirmative Defense.

1. **In Missouri, the elements of estoppel are defined and AT&T is estopped from asserting questions regarding eligibility as an affirmative defense.**
8. Estoppel requires an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon; action by the other party on the faith of such admissions, statement, or act; and injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act. *Brown v. State*

⁴ *Id.* (Emphasis added).

⁵ Also note that AT&T's generic letter does not seek relief regarding any promotional credit request where the underlying order has been disputed under the contract; it merely indicates that AT&T is conducting an investigation.

Farm Mutual Auto. Ins. Co., 776 S.W.2d 384, 386 (Mo. 1989) (citing *Miss.-Fox River Drainage Dist.*, 735 S.W.2d 748, 754 (Mo. App. 1987)).

9. In the instant matter, AT&T reviewed, approved, and deemed eligible each and every underlying order submitted by Nexus and partially credited Nexus for each and every promotional credit request now at issue. Such acts by AT&T are inconsistent with AT&T's current affirmative defense which raises, for the first time, questions regarding the eligibility of Nexus' end users. Additionally, Nexus relied on AT&T's honoring of both the underlying orders and the promotional credit requests when Nexus later disputed the amount AT&T improperly credited Nexus and further when Nexus filed its complaint with this Commission. Lastly, a re-examination of all 15,634 promotional credit requests would result in significant injury to Nexus because the cost in human and legal resources necessary to vet these claims would quickly eclipse the amount at issue and create unreasonable and undue delay.

10. AT&T's actions, Nexus' reliance on the faith of such action, and the resulting injury to Nexus (and the Commission and public) that would occur if AT&T were allowed to now contradict itself satisfy the elements required for estoppel. Because AT&T is estopped from asserting an affirmative defense raising questions regarding eligibility, the Commission should reconsider its *Order* and modify same to deny AT&T's motion to compel on all counts.

2. Waiver is a separate legal doctrine, but equally applicable in the instant matter.

11. Waiver is founded upon the "intentional relinquishment of a known right." *Shapiro v. Shapiro*, 701 S.W.2d 205, 206 (Mo. App. 1985). If waiver is "implied from conduct, the conduct must clearly and unequivocally show a purpose to relinquish the

right.” *Id.* Here, AT&T has waived its right to contest eligibility because it failed to question the eligibility of Nexus’ end users at the time Nexus ordered telecommunications services and requested the associated promotional credits. AT&T then later failed to question the eligibility of Nexus’ underlying orders at the time Nexus disputed the amount AT&T under-credited. Furthermore, AT&T reviewed, approved, and deemed eligible each order and actually credited Nexus an amount for each associated promotional credit request now at issue. Moreover, AT&T has failed to initiate or follow the billing dispute procedures required by the parties’ interconnection agreement. Such conduct by AT&T amounts to waiver of its right to question eligibility.

12. Only now, in the face of crediting Nexus with the full and lawful amount of each promotional credit request, does AT&T scramble to raise questions regarding eligibility. Therefore, AT&T’s failure to timely question eligibility not just once, but twice, is clearly an intentional relinquishment of its right to do so that may be reasonably implied by its clear and unequivocal conduct. Because AT&T has clearly waived its right to question the eligibility of Nexus’ orders and the associated promotional credit requests, Nexus respectfully moves the Commission to reconsider its *Order* and modify same to deny AT&T’s motion to compel on all counts.

III. CONCLUSION AND PRAYER

13. Nexus’ pleadings do not raise questions regarding eligibility and/or qualification for any order or associated promotional credit request 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 partially credited Nexus and which AT&T reviewed, approved, and deemed eligible the underlying order. As such, Nexus only

seeks relief from the Commission with respect to *how much is due* Nexus for a promotional credit request when *AT&T has already reviewed, approved, and deemed eligible* the underlying order.

14. AT&T has not followed the provisions of the parties' interconnection agreement to initiate a billing dispute. Because AT&T has not satisfied the dispute resolution provisions, AT&T is barred by contract from circumventing those provisions and now raising questions regarding eligibility during these proceedings.

15. In addition, AT&T is estopped from challenging the eligibility of the underlying orders in this case because of its prior actions, Nexus' reliance on those actions, and the potential injury to Nexus should AT&T be allowed to repudiate its prior actions.

16. Furthermore, AT&T has waived its right to contest the eligibility of Nexus' end users as a result of its intentional relinquishment of any right to do so. Such relinquishment was reasonably implied by Nexus from AT&T's conduct in which it reviewed, approved, deemed eligible, partially credited, and never properly disputed the eligibility of Nexus' promotional credit requests or the underlying orders.

17. For these reasons, a re-examination of the eligibility of Nexus' orders and promotional credit requests now at issue is clearly outside the scope of the proceeding now before the Commission; thus, AT&T's 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 to compel 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 1st day of August, 2011.

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s/ Chris Malish
Christopher Malish

STATE OF MISSOURI
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NEXUS COMMUNICATIONS, INC.)	
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D/B/A AT&T MISSOURI)	
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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.
