

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' RESPONSES 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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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.

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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:

Nexus timely objected to RFA No. 1-1 and maintains and incorporates its objection herein by reference.

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 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.

Subject to the forgoing objection, Nexus admits that the average or median subscriber maintains service with Nexus for more than 30 days.

RFI No. 1-1:

If your response to Request for Admission No. 1-1, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see objections and response to Request for Admission above, which is incorporated herein by reference the same as if set forth at length.

RFA No. 1-2:

Admit or deny that the Missouri wholesale discount of 19.2% was calculated by dividing an estimate of avoided costs by an estimate of all retail revenues.

RESPONSE:

Nexus has insufficient information to confirm or deny this request since Nexus was not present when the discount percentage was calculated, but has no reason to believe the discount was not calculated as above described.

RFI No. 1-2:

If your response to Request for Admission No. 1-2, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see the response to Request for Admission above, which is incorporated herein by reference the same as if set forth at length.

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:

Nexus timely objected to RFA No. 1-3 and maintains and incorporates its objection herein by reference.

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

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's obligations to resellers. The material thus is not calculated to the lead to the discovery of admissible evidence.

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 makes to its retail customers at the effective retail rate less avoided costs.

The information sought by AT&T here – 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 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.

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.

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.

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.

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.

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).

Accordingly, the only information relevant to determining whether AT&T has met its obligations under the Act 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 whether AT&T 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 seeks information about Nexus' interactions with third parties – Nexus’ customers – which is utterly irrelevant and inadmissible in this case.

Because this request is completely 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.

RFI No. 1-3:

If your response to Request for Admission No. 1-3, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see objections and response to Request for Admission above, which is incorporated herein by reference the same as if set forth at length.

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:

Nexus timely objected to RFA No. 1-4 and maintains and incorporates its objection herein by reference.

Nexus objects to this request for the same reason it objects to RFA No. 1-3, and incorporates that objection herein the same as if set forth at length. 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’s obligations to resellers. The material thus is not calculated to lead to the discovery of admissible evidence.

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 makes to its retail customers at the effective retail rate less avoided costs.

RFI No. 1-4:

If your response to Request for Admission No. 1-4, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see objections and response to the Request for Admission above, which is incorporated herein by reference the same as if set forth at length.

RFA No. 1-5:

Admit or deny that a one-time cash back offer reduces the effective price that retail customers pay.

RESPONSE:

Admit.

RFI No. 1-5:

If your response to Request for Admission No. 1-5, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Not applicable.

RFA No. 1-6:

Admit or deny that under the Final Arbitration Order, in Case No. TO-97-40, July 31, 1997, the wholesale price for a resold telecommunications service changes whenever the retail price of the service changes.

RESPONSE:

Nexus has insufficient information to confirm or deny this request since Nexus was not provided (and does not possess) a copy of the document referenced; however, Nexus's experience is indeed that when the retail price of the service changes, so does the wholesale price.

RFI No. 1-6:

If your response to Request for Admission No. 1-6, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see the response.

RFA No. 1-7:

Admit or deny that the difference between the retail and wholesale prices of a telecommunications service [retail price – wholesale price] changes when the retail price changes.

RESPONSE:

Admit only to the extent that the numerical difference between the retail and wholesale prices of telecommunications services change and further that no promotion or special sale is applied to either the retail or wholesale price of the telecommunications services in question.

RFI No. 1-7:

If your response to Request for Admission No. 1-7, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see response. If the cost avoided associated with a particular service is calculated based on the standard retail rate, then there will be no difference in the difference between wholesale and the standard retail rate (on the one hand) and the difference between wholesale and the effective retail rate for services subject to cash back promotions lasting longer than 90 days. There are also theoretical instances (for example, when the price of service is \$25, the

wholesale discount percentage is 20%, and the cash back promotion is \$50) when applying a straight "20% less than" discount to the effect retail rate makes no difference.

RFA No. 1-8:

Admit or deny that the percentage difference between the retail and wholesale prices of a telecommunications service in Missouri is 19.2% and does not change when the price of the retail service changes.

RESPONSE:

Admit only to the extent that the wholesale price is 19.2% *less than* the retail price and further that no promotion or special sale is applied to either the retail or wholesale price of telecommunications services.

RFI No. 1-8:

If your response to Request for Admission No. 1-8, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see response. Also, note that if the cost avoided associated with a particular service is calculated based on the standard retail rate, then there will be no difference in the difference between wholesale and the standard retail rate (on the one hand) and the difference between wholesale and the effective retail rate for services subject to cash back promotions lasting longer than 90 days in ordinary numbers. These differences may have a different ratio to the effective retail rate, however.

RFA No. 1-9:

Admit or deny that the wholesale price given by the equation does not constitute a price squeeze in Missouri.

$$[\text{Wholesale price}] = (1 - 0.216) \times [\text{Retail Price} - \text{Cash back Amount}]$$

RESPONSE:

Deny.

RFI No. 1-9:

If your response to Request for Admission No. 1-9, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

The formula does result in a price squeeze when the cash back amount exceeds the retail price, because in such instances (all other things being equal), the formula allows AT&T to sell

the services in question to its retail customers for an amount lower than the price that it charges Nexus and other CLECs at wholesale.

RFA No. 1-10:

Admit or deny that the FCC permitted (but did not require) each ILEC to calculate its wholesale prices as the product of the retail price and a constant percentage wholesale discount:

$$[\text{wholesale price}] = [1 - \text{wholesale discount \%}] \times [\text{retail price}]$$

RESPONSE:

Deny.

RFI No. 1-10:

If your response to Request for Admission No. 1-10, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

The FCC never identified a mathematical formula for calculating the wholesale rate. However, Nexus' understanding of the FCC's orders is that the FCC allows the wholesale price to be calculated as the retail price *reduced by* a percentage. But the *formula* presented is not an accurate mathematical translation of this concept and does not always produce the results required – most noticeably in the instance of effective retail rates below zero. In such instances, the formula presented actually results in a wholesale rate greater, rather than less than, the retail rate.

RFA No. 1-11:

Please list every state in which Nexus Communications, Inc. resells telecommunications services where the wholesale price is calculated by subtracting a constant measure of avoided cost from the retail price. By “constant measure of avoided cost” is meant a dollar value of avoided cost that does not change when the price of the retail service changes.

RESPONSE:

Illinois. Discount is based on cost avoided specific to service provided. When cash back promotions are in play, Nexus receives the full face value of the cash back promotion when it otherwise qualifies for same.

RFI No. 1-11:

If your response to Request for Admission No. 1-11, above, was anything other than “none”, please explain for each state how the wholesale price is calculated.

RESPONSE:

See above.

RFA No. 1-12:

Confirm that the FCC stated that “We must also determine when a promotional price ceases to be “short term” and must therefore be treated as a retail rate for an underlying service” in its *Local Competition Order* ¶ 950.

RESPONSE:

Confirmed. The FCC was distinguishing between “promotions that are limited in length [which] may serve precompetitive ends,” (e.g., those of 90 days or less) and those of longer duration (e.g., longer than 90 days). Furthermore, the FCC continued, “[p]romotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A).”¹ Therefore, retail rates reduced by a promotional offering (e.g., \$25 ordinary retail rate subject to a \$50 cash back promotion) must be offered for resale at the promotional rate less the costs avoided associated with that service. Note that the FCC does not specify that the costs avoided associated with a service subject to promotions or special sales should be calculated differently from the costs avoided for the same service charged at the standard rate. Thus, a \$25 ordinary retail rate subject to a \$50 cash back promotion results in a promotional retail rate of -\$25. The wholesale rate of such promotional retail rate would then be the promotional retail rate of -\$25, minus the costs avoided associated with the service provided, which may be calculated from the standard rate, or a percentage “less than” the effective retail rate.

RFI No. 1-12:

If your response to Request for Admission No. 1-12, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see the response.

RFI No. 1-13:

What do you understand is meant by the phrase “treat[ing] [the promotional price] as a retail rate for an underlying service” in the FCC quotation in RFA No. 1-12?

RESPONSE:

Please see the response to said RFA.

RFA No. 1-14:

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, ¶ 950 (rel. Aug. 8, 1996).

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:

Nexus timely objected to RFA No. 1-14 for the same reasons it objected to RFA 1-1 and maintains and incorporates its objection here by reference the same as if set forth at length.

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

The “average” over a number of months is 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 first month to which a \$50 cash back applies to a hypothetical \$25 cost of service, the referenced formula provides a wholesale rate that is 21.6% less than the effective retail rate of -\$25. Please note that AT&T appears to be referencing the Texas discount rate in this formula for some reason.

For the first month to which a \$50 cash back applies to a hypothetical \$25 cost of service, and the referenced formula is changed to a 19.2% discount rate, the formula still provides a wholesale rate that is 19.2% less than the effective retail rate of -\$25.

RFI No. 1-14:

If your response to Request for Admission No. 1-14, above, was anything other than an unconditional admission, explain each and every reason why.

RESPONSE:

Please see the objection to the request.

RFA No. 1-15:

Admit or deny that no Nexus customer in Missouri for whom Nexus has requested a cash back credit has disconnected service fewer than 31 days from when service was connected.

RESPONSE:

To the best of Nexus' knowledge, Nexus was not credited for any situation where a Nexus customer disconnected service fewer than 31 days from when service was connected.

RFI No. 1-15:

If your response to Request for Admission No. 1-14, above, was anything other than an unconditional admission, please state the number of such customers.

RESPONSE:

Please see response.