

**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.)	

AT&T MISSOURI’S RESPONSE TO NEXUS’ APPLICATION FOR REHEARING

COMES NOW AT&T Missouri,¹ and pursuant to 4 CSR 240-2.080(15) and 4 CSR 240-2.160, respectfully submits its response to Nexus Communications, Inc.’s (Nexus’) Application for Rehearing of the Commission’s January 26 Order Dismissing [Nexus’] Complaint Without Prejudice (“Order”). For the reasons that follow, Nexus’ Application should be denied.

1. As an overarching matter, the Commission committed no error in concluding first, that Nexus failed to comply with the Commission’s “notice of intent” rule, and second, that Nexus failed to show good cause for not having complied with the rule.

2. Nexus was afforded several opportunities to demonstrate good cause, but instead focused on trying to exempt itself from a rule applicable to every Missouri regulated utility. Additionally, Nexus could have filed a notice of intent immediately after AT&T Missouri raised the issue in its December 9 motion to dismiss Nexus’ complaint. Had it done so, Nexus would have mitigated the consequences of its own noncompliance. It also would have spared the valuable managerial, regulatory and legal resources of the Commission, its Staff, and AT&T Missouri. Nexus provided the Commission no sufficient basis for affording it any relief, and its Application offers no new pertinent facts overlooked by the Commission, only but another new legal argument that may be easily dismissed.

¹ Southwestern Bell Telephone Company d/b/a AT&T Missouri (“AT&T Missouri”).

3. Nexus first argues that the Commission's dismissal of its complaint "unlawfully interferes with" Nexus' statutory right to bring a complaint pursuant to §§ 386.390 and 386.400, RSMo. Application, at 2. But Nexus is mistaken in its assumption that these statutes govern this proceeding; thus, its argument is irrelevant and affords no basis for a rehearing of the Commission's Order.

4. It is abundantly clear that Nexus' complaint rests not on claimed violations of state law; but rather, claimed violations of those federal laws which govern the terms of Nexus' interconnection agreement with AT&T Missouri. The caption of Nexus' complaint refers only to a "Dispute over Interpretation of the Parties' Interconnection Agreement" and the text of the complaint similarly asserts that "[t]he parties' dispute arises under their interconnection agreement." Complaint, at 1, 2. In short, as the Commission has correctly observed, Nexus' complaint is one "seeking enforcement of the interconnection agreement." Order, at 9.

5. That being the case, it is settled law that the Commission's jurisdiction over this dispute arises from its grant of authority under § 252(e)(1) of the federal Telecommunications Act of 1996 ("the Act") to approve negotiated or arbitrated interconnection agreements, which authority necessarily includes the power to interpret and enforce approved interconnection agreements. *See, Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d

942, 946-47 (8th Cir. 2000).² Indeed, Nexus’ own complaint recognizes this fact, as it alleges various violations of §§ 251 and 252 of the Act and the FCC’s rules promulgated in accordance with the Act, Complaint, at 2, 4, and 5, but no violations of state statutory law or the Commission’s rules.

6. Nexus makes no claim that the Commission’s notice of intent rule “unlawfully interferes with” Nexus’ right to bring its interconnection agreement dispute before this Commission, nor could it.³ The Act carefully preserves state commission authority to enforce reasonable rules and regulations not inconsistent with the Act. See, 47 U.S.C. §§ 251(d)(3), 252(e)(3), 253(b). The Commission’s notice of intent rule is nothing more than the Commission’s proper exercise of its authority to impose reasonable rules and regulations regarding *ex parte* and extra-record communications. In any case, the relative ease with which a notice of intent can be quickly prepared and filed with the Commission belies any notion that the Commission’s rule actually interferes with Nexus’ federal rights, and even if that were not the case, the rule’s allowance for a “good cause” waiver under appropriate circumstances entirely eliminates any such potential. The Commission cannot be faulted for Nexus’ own failure to have shown such good cause here.

² As the Eighth Circuit Court of Appeals explained:

The question is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The new regime for regulating competition in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law. Therefore, while the grant of state commission enforcement power in § 252 is implicit rather than express, we can reach no conclusion but to agree with the FCC’s determination that the state commissions’ power to enforce interconnection agreements springs from § 252.

Id. (internal quotations and citations omitted). Consequently, while the Arkansas “Administrative Law Judge determined that state law, not federal law, provided the Commission with jurisdiction[.]” the Court determined otherwise, stating that “we do not agree.” *Id.*, at n. 2.

³ Taken to its logical extreme, Nexus’ argument could be used to assert the invalidity of other reasonable Commission rules and regulations. For example, on the strength of Nexus’ argument, one could seek to attack the Commission’s requirement that only a natural person can represent himself before the Commission, while companies and other entities must appear through an attorney. 4 CSR 240-2.040(5).

7. With two exceptions, none of the factual assertions in Nexus' Application are new, and all were adequately and correctly addressed in the Commission's Order (and its January 5 Order to Show Cause). The first exception is Nexus' assertion that "the Commission has not defined 'good cause' for purposes of this [notice of intent] rule." Application, at 4. That assertion is inaccurate. AT&T Missouri brought just such a case to the Commission's attention in its January 24 Reply to Nexus' Response to Order to Show Cause and Request for Waiver. *See, In the Matter of Rex Deffender Enterprises, Inc. Request for a Increase in Annual Water System Operating Revenues, File No. WR-2011-0056, Order Regarding Waiver Request*, 2010 Mo. PSC LEXIS 878 at *2 (September 8, 2010) (granting a waiver of 4 CSR 240-040(2) and stating that the term "good cause" generally means "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law" or a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his legal duties.") (further citations omitted). None of Nexus' previous arguments met these standards, and Nexus' now repeating them in its Application does not cure this failure.

8. The second exception is Nexus' claimed damages, and its subsequent submission after the effective date of the Order of an affidavit by an employee of Smart Telecom Concepts LLC relating to Nexus' claimed losses. For several reasons, Nexus' statements and proffered affidavit are entitled to no consideration and are of no value in any event.

9. First, the affidavit was not timely submitted and cannot be considered a part of Nexus' Application. Nexus filed the affidavit on February 7, three days after it filed its Application, and two days after the February 5 effective date of the Commission's Order. *See*, § 386.500, RSMo. (requiring applications for rehearing to be filed "before" the effective date of

Commission orders and decisions).⁴ This deficiency is not met by the Application's statements of counsel regarding alleged damages because, as the Commission has already correctly determined, "the statements of counsel are not evidence." Order, at 8. Nor is it met by the Application's statement of counsel that "[a]n affidavit will be filed in support of this paragraph in several days." Application, at 4. Because the affidavit was filed after the effective date of the Order, it is of no effect.

10. Second, the affidavit is entitled to no weight even were it regarded as timely filed. The affidavit is written by one who provides no information regarding his position, qualifications, or any details as to the nature of his employment with Nexus' apparent third party vendor; nothing more is said than that the affiant is "partially responsible for invoice auditing." Third, the affidavit provides not even the barest of details about what "records and accounts" were reviewed by its author or how the "amount due" from AT&T Missouri was calculated. Thus, no inferences can be drawn as to the affidavit's accuracy or completeness.

11. Regardless, Nexus' affidavit and repeated claims of hardship in the form of claims it will lose to the interconnection agreement's time bar are beside the fundamental point. That is largely because, as the Commission has twice held, "[i]n any event, any loss of claims is due to Nexus's own failure to comply with 4 CSR 240-4.020(2)." Order, at 8; *see also*, Order to Show Cause, at 7. It is also because, despite multiple opportunities afforded Nexus to demonstrate good cause for its failure, it did not do so.

⁴ *See also*, State of Missouri ex rel. Alton Railroad Company v. Public Service Commission, 155 S.W. 2d 149, 153 (Mo. 1941) (holding that the word "before" as used in § 5689, the predecessor to § 386.500, "has a definite meaning and needs no statutory construction" and that it means "*preceding* in point of time"). (emphasis added).

WHEREFORE, AT&T Missouri respectfully submits that the Commission should deny Nexus' Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to each of the below by e-mail on February 14, 2011.


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