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.	)	

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T MISSOURI IN SUPPORT OF ITS MOTION TO DISMISS

COMES NOW Southwestern Bell Telephone Company (f/k/a Southwestern Bell Telephone, L. P.), d/b/a AT&T Missouri ("AT&T Missouri"), and respectfully files its reply to the response of Nexus Communications, Inc. ("Nexus") to AT&T Missouri's motion to dismiss.

A. Summary

Nexus does not dispute that it failed to file with the Commission a notice of its intent to file a contested case, as is plainly required by Commission Rule 4.020(2). Instead, Nexus advances various reasons to excuse its noncompliance which are wholly unpersuasive and which would entirely eviscerate the rule if the Commission were to accept any of them. Nexus also continues to shrug off the dispute resolution requirements of the parties' Commission-approved interconnection agreement by asserting that attempting dispute resolution would be "essentially futile." Yet, Nexus advances no good reason for taking this position and, in any case, none of the self-serving reasons it does advance have any legal significance because none are contained in the complaint sought to be dismissed here.

Nexus' disregard of both the Commission's rule and the mandatory dispute resolution procedures contained in the interconnection agreement should not be countenanced. The complaint should be dismissed.

B. The Commission Should Dismiss Nexus' Complaint due to Nexus' Failure to Have First Filed a Notice of Its Intent to File a Contested Case.

1 Commission Rule 4.020(2) (4 CSR 240-4.020(2)) states:

> Any regulated entity that intends to file a case likely to be a contested case shall file a notice with the secretary of the commission a minimum of sixty (60) days prior to filing such case. Such notice shall detail the type of case and issues likely to be before the [C]ommission.

2. The text of the rule is clear and unambiguous, and Nexus does not claim otherwise. A "notice" must be filed at least 60 days before a "contested case" is filed. Likewise clear and unambiguous is that, as the Commission itself acknowledged, Nexus has here "instituted a contested case." Motion, at 3, *citing*, Notice of Contested Case (November 9, 2010), at 1. Finally, there is no dispute that Nexus failed to file the requisite notice. Thus, as AT&T Missouri explained in its motion, the case was inappropriately filed and should be dismissed. Motion, at 3-4.

3. Nexus' response presents a grab bag of four counter-arguments consisting of a "policy" argument and three alternative arguments. Each should be rejected.

4. Nexus first argues that enforcing the rule here would offend the policy of the rule because, according to Nexus, the rule is not meant to regulate communications, such as its complaint, which become part of an evidentiary record. Response, at 2. But the fact is that the rule does exactly that and, with respect to anticipated contested cases, it does so for a very

specific reason – to better enable the Commission to *directly* regulate communications that would otherwise be *outside* the evidentiary record.

5. The rule was the culmination of significant and prolonged thought and debate among a host of interested parties and industries. Under the rule, as the Office of Public Counsel observed, "parties and the public will be notified of communications that occur well before the filing of such a contested case to prevent the appearance of improper lobbying shortly before the filing." Order of Rulemaking, 35 Mo. Reg. 885 (June 1, 2010). But the rule cannot work as intended unless the entity which anticipates filing a contested case files a notice at least 60 days before it actually does so. That is because, under the rule, "anticipated contested cases" are cases which a person "anticipates, knows or should know will be filed before the commission within sixty (60) days." 4 CSR 240-4.020(1)(A).

6. And, to make sufficiently certain that the rule had enough "teeth" to ensure timely filings of such notices, the Commission provided that filings (such as Nexus' complaint) that would otherwise be made a part of the case record as a matter of course "shall not be permitted and the secretary of the commission shall reject [them]." 4 CSR 240-4.020(2)(A). Nexus' "policy" argument, therefore, is misplaced. The rule in fact squarely targets filings like Nexus' complaint because, in the Commission's judgment, doing so is the single best means to ensure that its regulatory policy objectives regarding communications which occur *before* a complaint is filed will be met.

7. Nexus' first alternative argument is that AT&T Missouri must be wrong, because otherwise, "the Commission would not have opened an evidentiary record and issued notice of the complaint." Response, at 3. Careful inspection, however, shows that the Commission merely recited that "[o]n November 5, 2010, the complainant filed the complaint," that the

"filing instituted a contested case" and that "[t]he Commission is giving notice of the commencement of a contested case." Notice of Contested Case (November 9, 2010), at 1. Nowhere does the notice state that the Commission's above "notice of intent to file" rule is inapplicable. Regardless, it would be better to dismiss the complaint and require that Nexus follow the rule than to acquiesce in its broad view that the rule is inapplicable to the filing of complaint cases by one public utility against another.

8. Nexus next argues that the Commission should waive the rule for "good cause," but it cites no grounds that would qualify for such treatment. Although Nexus is quick to emphasize that the Commission "has already opened the record and issued AT&T a notice of the contested case," *id*., nowhere does Nexus even attempt to explain, as it must, why its *own* failure should be excused for good cause. In this circumstance, there is no proffered "good cause" explanation to consider, much less deem acceptable.

9. Nexus' final "alternative" argument is but another request for a "good cause" waiver that is no better than its last. Nexus claims that it "filed its complaint in order to toll the 24-month statute of limitations on its claims" and that dismissal of its complaint "would cause Nexus further harm by effectively barring its recovery from AT&T an additional two months' worth of promotional credits." Response, at 3. AT&T Missouri agrees with the underlying premise of Nexus' argument, that is, that for purposes of applying the appropriate period of limitations, any future filing by Nexus of a new complaint (after Nexus' filing of a timely notice of intent to file a contested case) would not "relate back" to the date of its filing of its non-compliant initial complaint. But that consequence has no bearing on whether Nexus has demonstrated good cause in its having failed to comply with the Commission's rule in the first instance. On that score, it is notable that Nexus' complaint alleges that AT&T Missouri has been

withholding the full value of cash-back promotions "going back to late 2003." Complaint, at 3. Even if one were to accept merely for sake of argument that this allegation is true, Nexus was presumably aware of AT&T Missouri's alleged practice for quite some time. Yet, it has offered no reason why it could not have filed the requisite notice more than sixty days before it filed its complaint.

10. Moreover, accepting Nexus' argument at face value would require complete abrogation of all pleading and/or filing rules whenever and simply because such rules, if applied as written, would result in the dismissal of a proceeding or in a finding that some or all of the claims in the complaint were untimely. Good cause to waive the application of a rule is not shown by being subject to the consequence of a failure to comply with the rule.

11. In sum, the application and meaning of Commission Rule 4.020(2) is clear, and so too is Nexus' failure to have complied with it. Given this, and the complete absence of any proffered facts as to why this failure might be regarded as understandable or otherwise excusable under the circumstances, Nexus' complaint should be dismissed. Not doing so, on the other hand, necessarily invites the prospect that the Commission's rule will be exceedingly difficult to enforce in the future. When the Commission adopted this rule, it put every practitioner before the Commission on notice that timely filing of a notice of intent is a condition precedent to filing a complaint case. The failure of Nexus' Texas counsel to follow that rule to the letter cannot now be laid at the doorstep of the Commission.

C. The Commission Should Dismiss Nexus' Complaint due to Nexus' Failure to Have First Complied with the Dispute Resolution Requirements of its Interconnection Agreement

12. The dispute resolution provisions of the parties' interconnection agreement are an important part of that agreement. Nexus cannot ignore them. Its attempt to "blow them off" in a

situation where it believes following them would be "essentially futile" (Response, at 6) should not be rewarded. It bears repeating that the parties, through their interconnection agreement, agreed as follows:

> The Parties desire to resolve disputes arising out of this Agreement without litigation. Accordingly, the Parties agree to use the following Dispute Resolution procedures with respect to any controversy or claim arising out of or relating to this Agreement or its breach. (General Terms and Conditions, Section 10.2.1) (emphasis added).

13. For the words "any controversy or claim" to have any meaning, they must extend to the controversy and claim that is the subject of Nexus' complaint. The Commission should enforce the substantial rights that AT&T Missouri has under that provision.

14. Under section 252(e)(1) of the federal Telecommunications Act, the Commission has 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). But where, as here, the parties to the contract are "bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion," the Commission has "no responsibility under section 252 to interpret and enforce an agreement." *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11280, at n. 14 (2000).

15. Short of the voluntary dismissal of its complaint, nothing Nexus says now can address this ground of AT&T Missouri's motion. Nexus concedes that its interconnection agreement with AT&T Missouri states that the parties "agree to use" the agreement's "Dispute Resolution procedures with respect to any controversy or claim arising out of or relating to this Agreement or its breach." Response, at 5. However, it is still the case that Nexus has not

invoked, much less exhausted, these dispute resolution procedures. Nor did Nexus give AT&T Missouri proper notice of its dispute.

16. It is thoroughly wrong (and, in any case, of no consequence) that, as Nexus asserts, "[a] request for promotional credit is, on its face, a dispute" or even that "the information provided in an order to AT&T and concomitant request for promotional credit is the same information necessary to pursue a dispute as required in Section 10.4 of the [General Terms and Conditions of the] ICA entitled 'Service Center Dispute Resolution.'" Response, at 5. As a preliminary matter, there is no support in the parties' interconnection agreement for the proposition that a mere "request" presents a dispute, and Nexus cites none. More fundamentally, the information which is required to be provided pursuant to the agreement's Service Center dispute resolution procedures is quite specific, and it must be provided by means of "written notice." Nowhere in Nexus' complaint does Nexus state that it provided such "written notices" to AT&T Missouri or that it provided AT&T Missouri the detailed information required to be

furnished in them.[1] In short, Nexus' actions fall woefully short of meeting the agreement's dispute resolution requirements.

17. Furthermore, following the dispute resolution provisions specified in the parties' interconnection agreement would not be "essentially futile," as Nexus now claims. Response, at 6. In support of its claim, Nexus asserts that because "AT&T cannot compromise its position" in other similar cases, "there is no reason to expect the parties to reach an agreement via informal dispute resolution." Nexus Response, at 6. Such statements, however, are of no significance. First, they do not constitute facts; they are mere expressions of Nexus' own self-serving opinion. Second, no facts that would even remotely support a futility argument are specifically set forth in the complaint which is the subject of AT&T Missouri's motion to dismiss.

[1] As a result of the 2005 Post M2A Arbitration proceeding, AT&T Missouri currently provides service to Nexus under the AT&T Missouri/Sprint Successor Interconnection Agreement, which was the first successor agreement approved by the Commission as a result of that proceeding (in Case No. TK-2006-0044). Nexus was one of those CLECs which had then agreed, pursuant to a memorandum of understanding, to be deemed to have selected the first-approved successor agreement. *See*, 2005 Post M2A Arbitration, Case No. TO-2005-0336, AT&T Missouri's Petition filed March 30, 2005, at para. 4, and Exhibit 3 (attaching the February 14, 2005, MOU executed by Nexus); *see also*, Notice Regarding CLECs That Have Not Selected an ICA, Case No. TO-2005-0336, filed October 24, 2005, at Attachment 1 (identifying Nexus as a CLEC to whom AT&T Missouri is providing service under the AT&T Missouri/Sprint successor agreement.

Section 10.4 of the agreement's General Terms and Conditions states: "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."

Section 10.4.1 states: "If the written notice given pursuant to Section 10.3 discloses that a CLEC dispute relates to billing, then the procedures set forth in this Section 10.4 shall be used and the dispute shall first be referred to the appropriate service center SBC MIDWEST REGION 5-STATE Service Center; SBC-7STATE Local Service Center (LSC); SBC CONNECTICUT Local Exchange Carrier Center (LEC-C)] for resolution. In order to resolve a billing dispute, CLEC shall furnish SBC-13STATE written notice of (i) the date of the bill in question, (ii) CBA/ESBA/ASBS or BAN number of the bill in question, (iii) telephone number, circuit ID number or trunk number in question, (iv) any USOC information relating to the item questioned, (v) amount billed and (vi) amount in question and (vii) the reason that CLEC disputes the billed amount. To be deemed a "dispute" under this Section 10.4, CLEC must meet the terms of section 8.6 or provide evidence that it has either paid the disputed amount or established an interest bearing escrow account that complies with the requirements set forth in Section 8.4 of this Agreement and deposited all Unpaid Charges relating to Resale Services and Lawful Unbundled Network Elements into that escrow account. (emphasis added).

18. Not only is following the dispute resolution procedures of the agreement legally required, doing so also would have positive practical effects in this case. This is because Nexus' complaint is long on broad generalizations and short on specifics. Nexus challenges AT&T Missouri's "'cash-back' promotions going back to late 2003." Complaint, at 3. But Nexus never alleges in its complaint which promotions it is referring to, that it ordered service that met the qualifications of those promotions, and if so, how many times. There is no quantification of Nexus' claims at all, much less any specific identification or summary of what Section 10.4.1 of the agreement requires, e.g., the date of the bill(s) in question, the telephone number(s),or circuit ID number or trunk number in question, the amount(s) billed and in question and the reason that CLEC disputes the billed amount.

19. Moreover, challenges going back to 2003 may well be outside the interconnection agreement's time limitations on such disputes. Without more specifics, one can only guess at this point. This is why following the dispute resolution provisions, as set forth in the parties' interconnection agreement, would shed some needed light on the scope and the specifics of Nexus' claims.

D. Conclusion.

For the foregoing reasons, AT&T Missouri respectfully submits that the Commission should dismiss Nexus' Complaint in its entirety.

Respectfully submitted,

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D/B/A AT&T MISSOURI

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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 December 30, 2010.


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