

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 SECOND AMENDED COMPLAINT

Complainant Nexus Communications, Inc. (“Nexus”) respectfully brings this amended complaint seeking to recover cash back promotional credits from Southwestern Bell Telephone, Co. d/b/a AT&T Missouri (“AT&T”) on the basis that AT&T is in violation of its statutory, regulatory, and contractual duties under the Telecommunications Act of 1996 (hereinafter “the Act”)¹ by refusing to provide Nexus promotional credits due from AT&T under the parties’ interconnection agreement (“ICA”) and in support thereof, shows as follows:

I. IDENTIFICATION OF PARTIES AND JURISDICTION

1. Complainant Nexus is a corporation headquartered at 3629 Cleveland Avenue, Suite C, Columbus, Ohio, 43224, and is a competitive local exchange carrier (“CLEC”).

Designated representatives for complainant are:

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Malish & Cowan, P.L.L.C.

Mark Comley
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¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et seq.*).

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2. AT&T is an incumbent local exchange carrier (“ILEC”) as defined by the Act.²

AT&T is registered in Missouri and its principal place of business is 208 S. Akard Street, Dallas, Texas 75202.

3. The Missouri Public Service Commission (“Commission”) has jurisdiction over the subject matter pursuant to Sections 252(d)(1) and 252(e) of the Act and Section 386.250(2) RSMo. The Commission has continuing jurisdiction to enforce the terms and conditions in the ICA.³

II. FACTS AND NATURE OF THE DISPUTE

A. Background Facts

4. AT&T provides wholesale telecommunications services to Nexus pursuant to the terms of the parties’ ICA entered into under Sections 251 and 252 of the Act, and approved by the Commission as adopted from Case No. TK-2006-0044.⁴ The parties’ dispute arises under their ICA and centers on promotional credits which are due Nexus

² 47 U.S.C. § 251(h)(1): Definition.

For purposes of this section, the term “incumbent local exchange carrier” means, with respect to an area, the local exchange carrier that

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission’s regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

³ 47 U.S.C. § 252(e).

⁴ Nexus adopted the ICA 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.

from AT&T as a result of Nexus reselling AT&T telecommunications services subject to AT&T “cash back” promotions offered at retail.

5. Over the past months and years, AT&T has sold its telecommunications services at a discount to its retail end users under various promotions that have lasted more than 90 days. By law, Nexus is entitled to purchase and resell those same services at the promotional rate, less the costs avoided by AT&T’s providing the services at wholesale, rather than retail.

6. Of concern in this particular case are “cash back” promotions AT&T has provided to retail end users going back to August 2008. The two promotions figuring in this dispute are known generically as the “Movers” promotion and the “Competitive Acquisition” promotion (for some reason also known as the “Win-back” promotion). For reasons unknown to Nexus, AT&T referred to these promotions by slightly different names in different sources (*e.g.*, marketing materials CLEC accessible letters, and tariff sheets) over time, although the eligibility criteria and ordering codes for these promotions remained largely the same. Presumably the differences stem from the fact that these materials are marketing materials rather than legal documents, and because the tariffs are directed towards AT&T’s customers and the Commission, while the audience for the accessible letters is the CLEC community. In any event, the differences are considered non-substantive.

7. Thus, for example in Missouri, the Movers promotion and the Competitive Acquisition promotion are both included in AT&T’s tariff sheet titled “Acquisition

Complete Choice® Package Promotion.”⁵ However, the Movers promotion is alternatively referred to by AT&T as the “Movers Cash Back Promotion” and the “Movers Rewards Promotion” in its accessible letters. Regardless, the ordering code associated with the Movers promotion is always “SW-100” and the criteria likewise remain largely unchanged, irrespective of how the title may have been altered from time to time. A form of the Movers promotion was offered from February 15, 2008, to November 1, 2010. A copy of the tariff sheet and copies of the accessible letters setting out the terms of this promotion were attached as Exhibit A in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* and are incorporated herein by reference as if set forth at length.

8. The Competitive Acquisition promotion is alternatively referred to as the “New Win-back Cash Back Promotion-SW” and “Win-back Cash Back Promotion-SW” in AT&T’s accessible letters. Either way, the ordering code associated with the Competitive Acquisition promotion is always “SW-121” and the criteria likewise remain largely unchanged, regardless of how the title may have been altered from time to time.

⁵ For example, the tariff sheet for the Movers promotion and Competitive Acquisition promotion describes the promotion terms as shown below. The CLEC accessible letters, although distinct in their promotion, generally track the same requirements.

ACQUISITION COMPLETE CHOICE® PACKAGE PROMOTION

The promotion is available from October 1, 2009 through March 20, 2010. Eligible customers are residential customers who have at least one local exchange access line or a substitute (e.g. a wireless line or VoIP service) with a carrier other than the Company at a service location that can be served by the Company. New customers moving from an AT&T local service area in a state and location where AT&T provides local exchange access service as an incumbent local exchange carrier are also eligible. Employees of the Company and its affiliates are not eligible.

During the promotion period, eligible customers who establish local service with the Company and purchase Complete Choice® Basic, Complete Choice® Enhanced, or a package containing the same features will receive a coupon redeemable for a \$50.00 rewards card. The customer must redeem the coupon within 30 days of receipt.

All nonrecurring feature or package installation charges associated with adding the features or a package that contains the required features to the customer's account will be waived. Customers must retain the Caller ID and Call Waiting for a minimum of 30 days.

A form of the Competitive Acquisition promotion was offered from September 29, 2008, to March 20, 2010. Copies of the accessible letters setting out the terms of this promotion were attached as Exhibit B in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* and are incorporated herein by reference as if set forth at length..

9. In any event, Nexus met the same qualifications as AT&T's retail end users and applied for these promotional credits. AT&T did not dispute that Nexus was entitled to the promotions at issue; in fact, AT&T approved, with respect to eligibility, Nexus' applications for each and every promotional credit at issue. The dispute now before the Commission arises from the fact that AT&T has extended Nexus only a fraction of the promotional credit due for each request Nexus filed and AT&T approved, rather than the full face value of the promotion as it should under federal law and as AT&T does for its own retail end users. Table 1, below, provides a summary of the promotional credit requests filed by Nexus in Missouri.

Table 1. Summary of "Cash Back" Promotional Credit Requests Approved, Full Face Retail Value, Discounted Amount Received, and Amount Underpaid.				
"Cash Back" Promotion (type and amount)	Number of Requests Approved¹ (08/08 to 11/10)	Retail Amount² (\$50.00 each)	Amount Received³ (\$40.40 each)	Amount Underpaid⁴ (\$9.60 each)
Movers \$50 Cash Back	13,255	\$662,750.00	\$535,502.00	\$127,248.00
Competitive Acquisition/Win-back \$50 Cash Back	2,379	\$118,950.00	\$96,111.60	\$22,838.40
TOTAL	15,634	\$781,700.00	\$631,613.60	\$150,086.40

1. AT&T did not dispute the validity of any of the 15,634 promotional credit requests on the basis of eligibility or that Nexus was not otherwise entitled to the promotion.
2. The full face retail value for either cash back promotion is \$50.00.
3. AT&T did not provide Nexus with the full face value for either cash back promotion as it does its own retail end users; rather, AT&T provided Nexus with an improperly reduced

amount where by AT&T discounted the cash back promotion by the wholesale discount percentage (\$50.00 less 19.2% = \$40.40).

4. Nexus seeks the difference between the full face value of the promotions, as AT&T should have provided (and what AT&T gives its own retail end users), and what AT&T improperly discounted and underpaid Nexus.
10. Nexus also references Exhibit C in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* and is incorporated herein by reference as if set forth at length. Exhibit C provides detailed information regarding the promotional credits at issue. It shows the promotion category, billing date, number of Nexus lines requesting the promotion, full retail amount of the promotion, discounted promotional amount Nexus received from AT&T, and the amount which AT&T owes Nexus.
11. Nexus also references Exhibit D in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* and is incorporated herein by reference as if set forth at length. Exhibit D provides 28 spreadsheets containing the raw data detailing the 15,634 promotional credit requests submitted via AT&T's web portal system for the promotional credits at issue in this dispute which were approved, but underpaid. Nexus cannot emphasize strongly enough that AT&T **already approved and deemed valid** each and every promotional credit request now before the Commission; however, AT&T improperly discounted the full face value of the promotions and credited Nexus with a reduced amount. AT&T has been in receipt of all relevant information regarding the promotional credit disputes as this material was provided by Nexus – in the very manner and via the proprietary web portal system that AT&T themselves prescribed – since December 13, 2010.⁶ Thus, the key dispute between the parties is **how to calculate the**

⁶ In disputing AT&T's underpayment of the approved promotion credits, Nexus provided all the information AT&T's dispute processing system required for the identification of each and every promotional credit request, such as:

- Record type;

proper amount due a qualifying reseller, such as Nexus, for valid promotional credit requests.

12. Please note that pursuant to their ICA, the parties are required to employ a detailed dispute resolution process for identifying charges and credits they wish to dispute with one another. This dispute resolution process requires AT&T and Nexus to identify charges or credits challenged by:

- Record type;
- Claim type;
- Account identification;
- Billing date;
- Customer claim number;
- Amount requested;
- Customer comments (this is where an explanation of the reason for the dispute goes); and
- Circuit identification/actual telephone number to which the promotion credit applies.

13. For the orders for which AT&T initially granted credit, if for some reason AT&T wished to reconsider the granting of credit for one or more of those orders, AT&T could have challenged the eligibility and/or qualifications of these promotional credit requests by using this dispute procedure as required by the ICA. In this case, Nexus has confined

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

its request for relief to only those orders whose eligibility for the promotion had not (and still has not) been formally disputed by AT&T as required by the ICA. (Other orders exist for which Nexus applied for promotional credit but was denied; however, Nexus has focused this case on the issue of what payment should be for those orders where eligibility was not disputed precisely to avoid a protracted and detailed case examining the eligibility of each order.) Under these circumstances, where AT&T has not followed the dispute resolution provisions in the ICA, AT&T is now estopped from contesting the underlying eligibility of the promotional credit requests which it approved, but underpaid.

14. To date, AT&T owes Nexus at least \$150,086.40 in approved, but underpaid, promotional credits. AT&T contends that it should not be required to extend to CLECs the entire amount of the promotion, but rather a lesser amount derived by reducing the promotional amount by the wholesale discount. AT&T's contention is incorrect and incompatible with the requirements of the Act, violates federal law, and harms competition. To comply with the law, the Commission should require AT&T to provide the full amount of the cash back promotion to Nexus and all other CLECs.

15. AT&T's actions result in unreasonable or discriminatory conditions, limitations, or prohibitions on the resale of telecommunications services and anti-competitive practices.

B. Controlling Law

16. Federal law provides, among other things, the following with respect to the terms and conditions of resale, including the obligation to make promotions available to resellers:

- 47 U.S.C. § 251(c)(4)(A). ILECs have 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 C.F.R. § 51.603(a). An ILEC “shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.”
- 47 C.F.R. § 51.605(a). ILECs “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. . . .”
- 47 U.S.C. § 251(c)(4)(B). ILECs have a duty not to “prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service.”
- 47 C.F.R. § 51.603(b). “A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.”
- 47 C.F.R. § 51.605(e). “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. § 51.613(a)(2). “The following types of restrictions on resale may be imposed: 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.”

Federal law provides, among other things, the following with respect to calculating the wholesale price of retail services which must be resold:

- 47 U.S.C. § 252(d)(3): “Wholesale prices for telecommunication 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.” (Emphasis added.)

- 47 C.F.R. § 51.607. “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.”

17. The overarching purpose behind these federal resale provisions is to permit CLECs to purchase, for subsequent resale, telecommunication services from the ILEC at a *lower* rate than the ILEC sells those services at *retail*. In short, *wholesale should always be less than retail*.

C. Controlling Contract Provisions

18. The ICA preserves the parties’ reservation of rights. In part, the ICA provides:

[i]n entering into this Amendment, neither Party waives, and each Party expressly reserves, any rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review.⁷

Furthermore, the ICA establishes governing law:

Unless otherwise provided by Applicable Law, this Agreement shall be governed by and construed in accordance with the Act, the FCC Rules and Regulations interpreting the Act and other applicable federal law. To the extent that federal law would apply state law in interpreting this Agreement, the domestic laws of the state in which the Interconnection, Resale Services, . . . products and services at issue are furnished or sought shall apply, without regard to that state’s conflict of laws principles. The

⁷ See Interconnection Agreement, AT&T Wholesale Amendment, Amendment to Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 Between Southwestern Bell Telephone Company d/b/a AT&T Missouri and Nexus Communications, Inc., Section 9, at 442.

Parties submit to personal jurisdiction in . . . St. Louis, Missouri . . . and waive any and all objection to any such venue.⁸

19. Moreover, the parties' ICA provides a method for calculating the wholesale price for services subject to promotions in effect for 90 or more days: in such circumstances the wholesale price should be the promotional price further reduced by the wholesale discount. That is, the wholesale price should still *be less than* the retail price.

3.5.2 This section applies only to . . . [AT&T in Missouri]:

3.5.2.1 Promotions of eighty-nine (89) days or less are not available to CLEC for resale.

3.5.2.2 Promotions of ninety (90) days or more are available to CLEC for resale at the applicable wholesale discount, state specific.⁹

20. Compare how AT&T treats the same promotions in Texas:

[r]esale services offered by [AT&T] through promotions will be available to CLEC on terms and conditions no less favorable than those [AT&T] makes available to its End Users, provided that promotions of 90 days or less, [AT&T] will offer the services to CLEC for resale at the promotional rate without a wholesale discount. For promotions of more than 90 days, [AT&T] will make the services available at the avoided cost discount from the promotional rate.¹⁰

This shows that services subject to promotions lasting 90 or more days should be resold at an amount less than the promotional price.

D. Proper Method for Determining Wholesale Price

21. It is undisputed that the costs of providing a particular service do not change, even if purchasers of that service may be able to purchase the service at a special sale, or promotional price. In other words, the avoided cost is the same for both a service sold at

⁸ See Interconnection Agreement, General Terms and Conditions, Governing Law, Section 22.1 at 54.

⁹ See Interconnection Agreement, Appendix Resale/SBC Missouri at 302.

¹⁰ See Public Utility Commission of Texas, Docket No. 29468, effective March 17, 2004; Docket No. 31778, effective September 28, 2005; and Docket No. 35754, approved June 28, 2008; Interconnection Agreement, Attachment 1: Resale, Section 3.2, at 3.

the standard/tariffed retail rate and the same service sold pursuant to a special sale, or promotional rate. This is because the *costs* associated with the service are the same, even if the *price* is temporarily changed (for a single month) for a particular customer pursuant to a special sale or promotion.¹¹ Just as this is correct for every other month for the service – and for every other customer, including those that are not eligible for the promotion – it remains appropriate to the single month that the promotional credit is applied.

22. The appropriate method for determining the wholesale price is to first calculate the amount of the avoided cost discount, then subtract the avoided cost from the actual sales price.¹² As we know from the law, the wholesale price is supposed to be the net retail price less the avoided costs involved with providing the service.¹³ However, the Commission has already determined how to calculate the avoided costs associated with these services: to properly determine the avoided cost, one multiplies the resale discount factor by the pre-promotion, standard/tariffed price. This gives one the base amount of

¹¹ At the time this Commission established the wholesale discount rate at 19.2% of the retail rate for telecommunications services, it focused on the tariffed, retail rate of services provided to calculate a wholesale discount percentage based on the methodology that the avoided costs for each product is proportional to its price. This methodology need not change just because AT&T has offered a promotion – the best estimate of a product's avoided retail cost is still best estimated by applying the discount to its pre-promotion retail price. Such an approach also ensures that resellers are entitled to the full, dollar-for-dollar value of an ILEC's promotional offerings to the same extent as retail, end-use customers.

¹² 47 U.S.C. § 252(d)(3): Wholesale prices for telecommunication 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 47 C.F.R. § 51.607: Wholesale pricing standard.

The wholesale rate than 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.

the avoided cost associated with the service, and thus the amount by which the wholesale price should be less than the effective retail price.

23. Furthermore, because the actual sales price is not necessarily the standard/tariff price, but can be lowered by short term “promotional” offers, *i.e.*, special sales, the Federal Communication Commission (“FCC”) requires all ILECs, including AT&T, to make the benefits of those promotions available to CLECs, such as Nexus.¹⁴

24. Indeed, in the *Local Competition Order* the FCC expressly recognized that ILECs (such as AT&T) could use promotions to manipulate their retail rates and effectively avoid their resale obligations. Consequently, the FCC found that the resale rates requirement in Section 251(c)(4) of the Act:

makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.¹⁵

25. Thus, the price from which the avoided cost discount is subtracted is the **lower** of the standard/tariff price, or, if any, the promotional price in effect for the services in question. Stated another way, the three steps to finding the wholesale price are:

STEP 1: Find the pre-promotion standard/tariffed retail price.

STEP 2: Find the avoided cost: multiply the standard/tariffed retail price by the wholesale discount factor.

¹⁴ 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**. . . . (emphasis added).

¹⁵ *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, ¶ 948 (rel. Aug. 8, 1996) (“*Local Competition Order*”) (emphasis added).

STEP 3: Subtract the avoided cost from the effective retail sales price, which is the standard/tariffed retail price

OR, if a promotion applies,

Apply the promotion to the standard/tariffed retail price (this is the net retail price a retail customer would pay) and **then** subtract the avoided costs (which is the discount a wholesale customer receives).

By applying this method, the wholesale price is always the **same amount less** than the retail price, *i.e.*, the amount equal to the costs avoided by providing the services at wholesale, which is a better reflection of the fact that the cost to provide the services is constant regardless of temporary fluctuations in the sales price caused by non-standard special sales. Table 2, below, shows how this works.

Table 2. Results of properly applying avoided cost discount based on standard/tariffed retail price.				
Standard/Tariff Retail Price	Standard Wholesale Discount Percentage ¹	Promotional Discount	Net Retail Price ²	Net Wholesale Price ³ (assuming avoided cost calculated as % of standard retail price)
\$25	20%	\$0	\$25	\$20 (\$5 less than net retail)
\$25	20%	\$50	-\$25	-\$30 (still \$5 less than net retail)
\$25	20%	\$100	-\$75	-\$80 (still \$5 less than net retail)

1. A hypothetical 20% wholesale discount percentage is used in this table for demonstration purposes and mathematical simplicity only. The wholesale discount percentage in Missouri is 19.2%.
 2. Standard/Tariff Retail Price – Promotional Discount = Net Retail Price
 3. Standard/Tariff Retail Price x Wholesale Discount Percentage = Avoided Costs
Standard/Tariff Retail Price – Promotional Discount – |Avoided Costs| = Net Wholesale Price
26. Note that calculating the wholesale discount – that is, the avoided cost discount – from the standard/tariff rate in this manner conforms to the principle that ***the wholesale price should always be less than the retail price***. As will be shown, AT&T's method of

determining the avoided cost discount does not produce such results, and in fact AT&T's method actually results in a situation where the wholesale price is *higher* than retail.

27. Another reason for adopting the method above is that the Act and FCC regulations require AT&T to offer certain promotions for resale “subject to the same conditions” as offered to retail customers. Thus, Nexus is entitled to the full value of AT&T's cash back promotions. According to the Act and pertinent FCC regulations, AT&T is required to offer its services for resale “subject to the same conditions” that AT&T offers its own end users and at “the rate for the telecommunications service, less avoided retail costs.”¹⁶ For example, when AT&T offers retail telephone service in conjunction with a “\$50 cash back” rebate to new customers, AT&T must make that offer available to CLECs “subject to the same conditions,” that is, with a \$50 cash rebate, and at “the rate for the telecommunications service, less avoided retail costs,” that is, at the tariffed retail price less the wholesale discount. FCC rules unambiguously place the reseller in the shoes of the retail customer when it acquires a service for resale. The FCC rules make clear that no additional conditions can be placed on the reseller, particularly any condition that would have the effect of imposing some restriction on the reseller that does not apply to AT&T retail customers. As such, resellers, like Nexus, are fully entitled to the full value of the cash back promotion just like an AT&T retail end user. To provide any less – or to impose any other qualifying requirements – violates the Act and FCC rules prohibiting any additional conditions or restrictions on Nexus.¹⁷

D. Improper Method for Determining Wholesale Price

¹⁶ 47 U.S.C. § 251(c)(4)(A). 47 C.F.R. §§ 51.603(b) and 51.607.

Furthermore, other than in limited circumstances not applicable here, AT&T cannot impose any restrictions on the resale of its services unless AT&T “proves to the state commission that the restriction is reasonable and non-discriminatory.” 47 C.F.R. § 51.613.

¹⁷ 47 U.S.C. § 251(c)(4)(B). 47 C.F.R. §§ 51.603(b) and 51.605(e).

28. AT&T contends that, if it is required to extend cash back promotions to CLECs at all, then it should not be required to extend the entire amount of the promotion to CLECs, but rather a lesser amount derived by reducing the promotional amount by the resale discount percentage.

29. The flaw in AT&T's methodology is that it results in a situation where its calculation of the wholesale price produces *a wholesale price that is greater than the retail price*. This flaw is dramatically illustrated by the promotions in question as shown in Table 3 below:

Table 3. Results of applying AT&T's improper method for calculating promotion amount due resellers (applying hypothetical 20% wholesale discount to both standard/tariff price and to promotional discount).				
Standard/Tariff Retail Price	Standard Wholesale Discount Percentage¹	Promotional Discount	Net Retail Price²	Net Wholesale Price³ (assuming avoided cost calculated as % of standard/tariff retail price)
\$25	20%	\$0	\$25	\$20 (\$5 less than net retail)
\$25	20%	\$50	-\$25	\$0 (same as net retail)
\$25	20%	\$100	-\$75	-\$60 (\$15 <u>MORE</u> than net retail)

1. A hypothetical 20% wholesale discount percentage is used in this table for demonstration purposes and mathematical simplicity only. The wholesale discount percentage in Missouri is 19.2%.
2. Standard/Tariff Retail Price – Promotional Discount = Net Retail Price
3. (Standard/Tariff Retail Price x Wholesale Discount Percentage) – (Promotional Discount x Wholesale Discount Percentage) = Net Wholesale Price

30. Obviously, adopting a model which results in a wholesale price that is more than the retail price guts the purpose of the Act, violates federal law, and dooms competition. AT&T's method clearly results in the shifting of "their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act" as warned by the

FCC in its *Local Competition Order*.¹⁸ Accordingly, AT&T's model cannot be correct. If the wholesale discount percentage is to be applied, it must be applied to reduce the ***promotional rate*** for the services – ***not*** the ***amount of the promotion*** – by the wholesale discount percentage.

31. The absurd reality is that Nexus has been paying a ***higher*** rate at wholesale than AT&T retail end users pay at retail when a promotion applies. Because Nexus has consistently been approved by AT&T, but not credited the full amount of the promotions to which it is entitled and instead by that amount less the wholesale discount, Nexus is entitled to recover the difference, and hereby pleads for the same.

III. PARTIES' EFFORTS TO RESOLVE DIFFERENCES

32. Because of past experience in attempting to negotiate this issue on behalf of other, but identically situated CLECs, counsel for Nexus knows that “negotiation” of the core issue in this case is futile: the instant matter before the Commission is only one out of 12 cases in jurisdictions that are ongoing or pending between the Nexus and AT&T regarding identical claims.
33. Moreover, AT&T has for many months been involved in litigation in approximately 12 other substantively identical pending cases in various jurisdictions, including before the Commission, with a number of other CLECs similar to Nexus.¹⁹

¹⁸ *Local Competition Order*, supra.

¹⁹ See also e.g., *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi Teleconnect, LLC*, Docket No. 31323 before the Alabama Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. dPi Teleconnect, LLC*, Consolidated Docket No. U-31364 before the Louisiana Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina v. dPi Teleconnect, LLC*, Docket No. P-836, Sub 5 before the North Carolina Utilities Commission; and *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC*, Docket No. 2010-18-C before the Public Service Commission of South Carolina. These cases also involve Competitive Acquisition and Movers cash back promotions which are substantively identical to those in this case.

Counsel for Nexus represents other CLECs in many of these cases, some of which are in jurisdictions which require an attempt at informal dispute resolution prior to bringing a formal complaint. However, these cases exist precisely because AT&T and CLECs cannot agree on the resolution of the polarizing issue now before the Commission – namely, the promotional credits that are due Nexus from AT&T as a result of Nexus reselling AT&T telecommunications services subject to “cash back” promotions offered at retail. Thus, further negotiation at this stage is essentially futile not only because AT&T cannot compromise its position with Nexus in Missouri and the other cases between the parties, but also because AT&T cannot compromise in Missouri without adversely affecting AT&T’s overall litigation stance in the other ongoing cases that it has itself filed and been pursuing with a number of other CLECs for many months.

34. Nonetheless, Nexus has made an attempt at informal dispute resolution by teleconference with between counsel for Nexus and AT&T at a high level. However, AT&T has been firm on its refusal to offer the full face value of its cash back promotions to Nexus and other CLECs since at least 2006.²⁰

35. In fact, AT&T has repeatedly admitted on the record that AT&T’s position and the CLEC position (which Nexus also espouses) on how to calculate the wholesale price for services subject to a cash back promotion are fundamentally irreconcilable, thereby necessitating commission intervention. For example, at a hearing before the Public Service Commission of South Carolina, counsel for AT&T affirmatively stated:

Right now the resellers are folding their arms and saying, “We are right on the law.” Frankly, we’re folding our arms and saying, “We are right on

²⁰ See *In the Matter of: Petition of Image Access, Inc. d/b/a New Phone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission’s Rules*; WC Docket No. 06-129 before the Federal Communications Commission.

the law.” And there’s no negotiation on the past-due billing because of that, and we need your guidance to break that logjam.²¹

36. Because AT&T cannot and will not negotiate – as required under the parties’ ICA – Nexus should be excused from performing such a futile act. In such situations, it is black-letter law that performance of a condition precedent otherwise required by contract is excused where such performance would be a futile act.²² The rule in Missouri is no different:

One who hinders performance by the other party may not avail himself of the nonperformance which he induced or occasioned. *See* 17A C.J.S. Contracts s 468, p. 645, wherein it is stated: “*** and, where he prevents, hinders, or renders impossible the fulfillment of a condition precedent or its performance by the adverse party, or is himself the cause of failure to perform the condition he cannot rely on such condition to defeat his liability.’

Hillis v. Blanchard, 433 S.W.2d 276, 279 (Mo. 1968). *Kreitz v. Egelhoff*, 231 Mo. 694, 132 S.W. 1124, 1127 (Mo. 1910) (“[I]f defendants wrongfully prevented full

²¹ *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC*, Consolidated Docket Nos. 2010-14-C ~19-C before the Public Service Commission of South Carolina, Hearing #10-11166, p. 24, lines 4-11, (P.S.C.S.C. December 16, 2010) (from opening statements by AT&T attorney, Mr. Patrick Turner).

See also BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi Teleconnect, LLC, Docket No. 31323 before the Alabama Public Service Commission, (Hearing transcript, p. 44, lines 11-16, (A.P.S.C. January 21, 2011) (from opening statements by AT&T attorney, Mr. Patrick Turner):

[W]e’ve got a log jam that’s building every day. We need to break it. We need to end this vicious cycle on going forward basis so we know the rules going forward. . . .;

and

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al., Consolidated Docket No. U-31364 before the Louisiana Public Service Commission, Hearing transcript, p. 14, lines 3-7, (L.P.S.C. November 4, 2010) (from opening statements by AT&T attorney, Mr. Patrick Turner):

Once we understand what the ground rules are, there’s probably some opening for some good negotiations. But today, both sides are saying, “I’m right on the Law.” And no one’s moving off the (INAUDIBLE). So we need that ruling. We also need it to end this vicious cycle of continuing disputes. . . .

²² Samuel Williston, Williston on Contracts § 47:4 (4th ed.).

performance, they may claim nothing by virtue of so much of the nonperformance as was brought about by their own wrongful act.”).

37. The North Carolina Utilities Commission has said much the same thing about enforcing informal dispute resolution provisions under circumstances like those we have here:

We believe that the purpose of the escalation provision was to permit the parties, in good faith, to attempt to resolve disputes prior to resorting to a forum such as this Commission. To be effective, each party has to be open to a negotiated resolution of a disputed issue. Here, because of the unyielding position taken by [AT&T], there could be no negotiated resolution. [AT&T’s] position was that these cashback promotions were not available for resale. No matter how many times dPi asked [AT&T], the answer would always be the same: denial, because “AT&T did not offer cashback promotions for resale.” (Tr. P. 165) Thus, any action taken by dPi to comply with the escalation process would have been futile. dPi’s nonperformance in this regard is therefore deemed to have been excused.²³

38. Because AT&T in Missouri cannot compromise AT&T’s overall position with Nexus (and other CLECs) without adversely affecting AT&T’s litigation stance in the many other pending cases, informal dispute resolution in this case is doomed. Therefore, the Commission should conclude that enforcement of the dispute resolution provisions is futile and allow the case to proceed.

WHEREFORE, PREMISES CONSIDERED, based upon the foregoing, Nexus respectfully requests and prays the Missouri Public Service Commission:

- Issue a declaration such that when a cash back promotion is offered by the ILEC in connection with a retail service, and the CLEC otherwise qualifies for the promotion, the service must be offered at the effective retail rate less the costs avoided in providing the service. Nexus suggests this means the service must be offered at the standard/tariffed price, less the wholesale discount, less the ***full amount of the cash back promotion***;

²³ Recommended Order, *In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent*, 2010 WL 1922679, *1922679 (N.C.U.C. May 07, 2010) (No. P-55, SUB 1744).

- Issue a ruling such that Nexus is entitled to recover all underpaid amounts for promotional credits already approved and deemed valid by AT&T; and
- Award Nexus any other such relief as it is entitled to in law and equity.

Respectfully submitted,

s/ Chris Malish

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CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of the foregoing Second Amended Complaint was served by electronic mail this 11th day of July 2011, to:

General Counsel's Office at gencounsel@psc.mo.gov;
Office of Public Counsel at opcservice@ded.mo.gov;
Cully Dale at cully.dale@psc.mo.gov;
William Voight at william.voight@psc.mo.gov; and
AT&T Missouri at robert.grysmala@att.com and leo.bub@att.com.

s/ Chris Malish
Christopher Malish

EXHIBIT A

(Incorporated by reference from Exhibit A in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* as if set forth at length.)

EXHIBIT B

(Incorporated by reference from Exhibit B in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* as if set forth at length.)

EXHIBIT C

(Incorporated by reference from Exhibit C in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* as if set forth at length.)

EXHIBIT D

(Incorporated by reference from Exhibit D in *Direct Testimony of Mark Deek on Behalf of Nexus Communications, Inc.* as if set forth at length.)