

**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.)	

**MOTION TO COMPEL RESPONSES TO DATA REQUESTS
DIRECTED TO NEXUS COMMUNICATIONS, INC.**

COMES NOW Southwestern Bell Telephone Company d/b/a AT&T Missouri (“AT&T Missouri”) and, pursuant to Commission Rule 2.090(8) (4 CSR 240-2.090(8)), respectfully moves the Commission to compel Nexus Communications, Inc. (“Nexus”) to respond to certain of AT&T Missouri’s Data Requests which were directed to Nexus, and to which Nexus presented a relevancy objection.¹ In support thereof, AT&T Missouri states as follows:

1. This motion seeks to compel Nexus to fully respond to six Data Requests to which it has objected. Three (Data Requests 7, 8 and 9) are directed to the issue of whether, with respect to the promotions which are the subject of Nexus’s Complaint² against AT&T Missouri, the end users for whom Nexus placed orders with AT&T Missouri claiming a promotional cash back credit were in fact qualified (or “eligible”) for the promotional credits. Three others (Data Requests 13, 14 and 15) are directed to the issue of whether Nexus has passed on to its end users

¹ In accordance with Commission Rule 2.090(8), undersigned counsel certifies that he has in good faith conferred by telephone with opposing counsel regarding the Data Requests which are the subject of this motion. Nevertheless, differences on the matter remain between AT&T Missouri and Nexus, thus necessitating this motion. A copy of the pertinent Data Requests and Responses thereto is attached to this motion, as Attachment A.

² Unless indicated otherwise, reference to Nexus’ “Complaint” shall mean Nexus’ First Amended Complaint.

the promotional credits which AT&T Missouri has already extended to Nexus (and whether Nexus will pass on to them any further credits it may obtain should its claims against AT&T Missouri prove successful). For the reasons explained below, the Commission should issue an order compelling Nexus to fully respond to all of these Data Requests.

(A) Summary of Argument

2. Data Requests 7, 8 and 9 are reasonably calculated to lead to the discovery of admissible evidence. Nexus must prove that the end users for whom Nexus placed orders claiming a promotional cash back credit were actually qualified (or “eligible”) for the promotional credits. Stated another way, Nexus cannot complain about *what* credit amount is owed it unless Nexus establishes that it is entitled a credit *in the first place*. Data Requests 7, 8 and 9 seek information directly pertinent to the extent to which Nexus is entitled to credits for all of the orders it placed. Additionally, the Data Requests are reasonably calculated to lead to evidence relevant to an affirmative defense raised by AT&T Missouri to Nexus’ Complaint (which squarely contests Nexus’ qualification for credits), and thus, the request should be responded to for this separate reason.

3. Data Requests 13, 14 and 15 are likewise reasonably calculated to lead to the discovery of admissible evidence. Whether Nexus has passed on to its retail customers the promotional credits AT&T Missouri has already provided to Nexus (and whether Nexus will pass on to any further credits) are considerations the Commission should take into account in making a reasoned decision consistent with the public interest and the purpose of resale discounts. Nexus’s opposing view – that it is irrelevant whether Nexus chooses to pass on the credits or to simply pocket them – should be rejected.

(B) AT&T Missouri's "Qualification" Data Requests (DRs 7-9)

4. During discovery, AT&T has sought to identify each promotion for which Nexus' Complaint challenges the associated cash back credits and whether, with respect to each promotion, the orders placed by Nexus were placed on behalf of customers who actually qualified (or were "eligible") for the benefits of the promotion. Pertinent to this motion are the following three Data Requests:

DATA REQUEST NO. 7: For each promotion identified in your response to Data Request No. 2,³ please describe the process, procedure or other mechanism Complainant used (or uses) to ensure that its requests to AT&T Missouri for cash-back promotional credits complied (or comply) with all end user eligibility and other requirements for the respective promotion, and produce all documents in Complainant's possession, custody, or control referencing, referring or pertaining to each such process, procedure or other mechanism and/or the results thereof when applied to the respective promotion.

DATA REQUEST NO. 8: For each promotion identified in your response to Data Request No. 2, please produce all documents in Complainant's possession, custody, or control which demonstrate or otherwise reflect that those end users to whom you offered the promotion *were eligible and qualified for* the promotion based on the criteria stated in the promotional tariff's terms and conditions, including but not limited to (a) notes prepared regarding conversations had between you (or your representative(s)) and end users, and (b) documents provided to you (or your representative(s)) by end users. (emphasis added).

DATA REQUEST NO. 9: For each promotion identified in your response to Data Request No. 2, please produce all documents in Complainant's possession, custody, or control which demonstrate or otherwise reflect that those end users to whom you offered the promotion *were not eligible and qualified for* the promotion based on the criteria stated in the promotional tariff's terms and conditions, including but not limited to (a) notes prepared regarding conversations had between you (or your marketing or sales representative(s)) and end users, and (b) documents provided to you (or your marketing or sales representative(s)) and end users. (emphasis added).

³ Data Request No. 2 states: "Please identify each and every AT&T Missouri cash-back promotion to which the Complaint relates and the number of Nexus customers that Nexus believes qualified for each promotion identified."

5. Nexus provided no information or documents responsive to any of the requests. It thus refused to provide any information or documents regarding whether the end users to whom Nexus offered the promotion were actually eligible and qualified for the promotion, or even whether Nexus had in place any processes, procedures or other mechanisms to ensure that its requests to AT&T Missouri for cash-back promotional credits complied with all end user eligibility and other requirements for the respective promotions. Instead, Nexus objected to each as irrelevant and not calculated to lead to the discovery of admissible evidence.

6. Nexus' relevancy objection lacks merit. Nexus must prove that the end users for whom Nexus placed orders claiming a promotional cash back credit were actually qualified (or eligible) for the promotional credits. Stated another way, Nexus cannot prevail on its claim about *what* credit is owed it unless Nexus also establishes that it is entitled to a credit *in the first place*.⁴ Information and documents regarding the matter are indeed calculated to lead to the discovery of admissible evidence.

7. In any case, even on its own terms, Nexus' objection is without merit. Nexus does not quarrel with the proposition that the orders it placed must be valid. Instead, Nexus argues that AT&T Missouri has somehow already acknowledged their validity:

[T]he amounts Nexus seeks are tied to orders for services subject to promotions which *have already been acknowledged to be valid* and paid in part by AT&T. The issue is thus not one of attempting to identify orders qualifying for a particular promotion, but rather the issue is one of underpayment for orders previously acknowledged as qualifying. While there are other orders disputed on grounds of eligibility, those orders whose eligibility were disputed are not a part

⁴ Cf., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*,"), para. 959 (noting, in connection with discussion of Section 251(c)(4)(B), 47 U.S.C. Section 252(c)(4)(B) and "cross-class selling," that "[t]here is a general consensus among incumbent LECs, IXC's, and others that resale of residential service should be limited to customers eligible to take such service from the incumbent LEC.").

of this case; they were purposefully left out of the present case by Nexus in order to simplify the issues presented to the Commission for resolution. (emphasis added; original emphases removed).⁵

8. There is no proof or evidence in the record of this case (much less a Commission finding) that AT&T Missouri has admitted (much less “acknowledged”) the validity of any of the orders which are the subject of the Complaint. Moreover, no such inference can be drawn simply because AT&T Missouri merely provided Nexus a credit on the basis of Nexus’ having placed a “promotion code” on its service order.⁶ Consequently, the Data Requests remain relevant to an issue presented by the Complaint, and Nexus should be required to respond to them fully.

9. Moreover, the Data Requests are relevant to the case for an entirely separate reason. AT&T Missouri has submitted an affirmative defense stating that “[t]he First Amended Complaint is barred and/or relief thereunder limited to the extent that Nexus and/or its end users failed to meet the terms and conditions of eligibility and/or qualification to receive the benefits of the promotional offers associated with the telecommunications services resold to Nexus.”⁷ AT&T Missouri’s Data Requests are not merely reasonably calculated to lead to the discovery of admissible evidence regarding this affirmative defense; rather, the information requested is *directly relevant* to the affirmative defense. Thus, for this separate and independent reason, the Commission should order that Nexus fully respond to each of the Data Requests.

⁵ Nexus’ Objection to Data Request No. 7 (which was also incorporated by reference into its Objection for Data Request Nos. 8 and 9).

⁶ Nexus’ Objection to Data Request No. 8.

⁷ See, Answer and Affirmative Defenses of Southwestern Bell Telephone Company d/b/a AT&T Missouri to the First Amended Complaint of Nexus Communications, Inc., filed May 24, 2011.

10. Such an order would be especially appropriate in light of two other considerations. First, Nexus argues that AT&T Missouri need not pursue this discovery because Nexus had already winnowed disputed orders out of its case. As Nexus put it, “While there are other orders disputed on grounds of eligibility, those *orders whose eligibility were disputed* are not a part of this case; they *were purposefully left out of the present case by Nexus* in order to simplify the issues presented to the Commission for resolution.” (emphasis added).⁸ Nexus’ assertion that it has left these orders out of the case should not be simply assumed or taken for granted; on the contrary, it may be challenged and is an appropriate area of inquiry through discovery.

11. Second, in its responses to AT&T Missouri’s Data Requests, Nexus indicated) that the principal promotion challenged by the Complaint is the so-called “Movers” promotion. The “Movers” promotion, begun in 2008 and discontinued in late 2010, provided either a \$50 bill credit or reward card to certain qualifying (or “eligible”) customers. Chief among other qualifying/eligibility requirements was that the customer had to “move” from one address to another. That is, existing customers were required to transfer existing service to a new address, and new customers were required to purchase new local service at a new address.⁹ AT&T Missouri has voiced concern about the legitimacy of Nexus’ orders for this promotion. For example, AT&T Missouri wrote Nexus on December 8, 2010, regarding the Movers Reward promotion, and asked for verifiable evidence that the end users for which Nexus had submitted service orders to AT&T Missouri had in fact moved. *See*, Attachment B hereto. Nexus has not responded to this letter, thus declining the opportunity “to demonstrate that its promotion

⁸ Nexus’ Objection to AT&T Missouri’s Data Requests 7, 8 and 9.

⁹ *See*, First Amended Complaint, Exhibit A, Accessible Letters CLEC07-374 and CLEC08-028.

requests have been submitted properly.” *Id.*, at p. 1. The Commission should now compel such a demonstration by granting AT&T Missouri’s motion.

12. For all these reasons, Nexus’ objections to each of Data Requests 7, 8 and 9 should be rejected and Nexus should be directed to provide full and complete responses to them.

(C) AT&T Missouri’s “Pass-Through” Data Requests (DRs 13-15)

13. When an AT&T Missouri retail customer qualifies for a discount, the discount is provided to the retail customer. Nexus objected to discovery seeking to determine whether Nexus passes through to its own retail customer the discounts it obtains from AT&T Missouri, on the basis that the inquiry is irrelevant and not calculated to lead to the discovery of admissible evidence. The Data Requests to which Nexus objected are:

DATA REQUEST NO. 13: When Complainant receives a cash-back promotional discount from AT&T Missouri, how much (if any) of the promotional discount does Complainant pass on to its end user customers? If any less than the full amount of the promotional discount is passed on, explain why the full amount is not passed on.

DATA REQUEST NO. 14: Please describe the process by which Complainant passes amounts described in Data Request No. 13 on to its end user customers and produce all documents in Complainant's possession, custody, or control that reference, refer to or pertain to such process.

DATA REQUEST NO. 15: If successful in this case, does Complainant intend to pass on to its end user customers any amounts recovered that represent additional promotional discounts? If not, why not?

14. Nexus should be made to respond fully to these requests. The Commission has jurisdiction of this matter pursuant to its authority under Section 252(e)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Section 252(e)(1), in that the authority expressly granted to the Commission under this section to approve negotiated or arbitrated

interconnection agreements necessarily includes the power to interpret and enforce such agreements.¹⁰ Section 252(e)(2)(A)(ii) requires that implementation of an interconnection agreement be “consistent with the public interest,” and whether Nexus passes through discounts or simply pockets them goes directly to whether the public is served by such conduct.

15. CLECs such as Nexus are afforded resale discounts in large part so that they may have a meaningful opportunity to compete with incumbent LECs, accomplished by their end users ultimately benefitting from the discount.¹¹ It is a fair question as to whether Nexus’ opportunity to compete has been at all compromised if the facts are that it simply keeps, and does not pass through, the credits it receives from AT&T Missouri, while AT&T Missouri extends credits to its own end users.


WHEREFORE, AT&T Missouri respectfully requests that the Commission grant its Motion to Compel, that it order Nexus to respond fully to each of Data Requests 7, 8, 9, 13, 14 and 15 by not later than fourteen (14) days following its issuance of an order, and that it grant AT&T Missouri such other and further relief as may be just and appropriate under the circumstances.

¹⁰ See, Southwestern Bell Telephone Co. v. Connect Communications Corp., 225 F.3d 942, 946-47 (8th Cir. 2000).

¹¹ Cf., *Local Competition Order*, para. 956 (noting, in connection with discussion of the resale of below-cost and residential service, that “unlike the pricing standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by the incumbent or by a reseller, just as it continues to take the contribution if the service is priced above cost. So long as resale of the service is generally restricted to those customers eligible to receive such service from the incumbent LEC, as discussed below, demand is unlikely to be significantly increased by resale competition.”).

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

BY 

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d/b/a AT&T Missouri

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to each of the below
by e-mail on May 27, 2011.


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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 MISSOURI'S FIRST 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 responses to Southwestern Bell Telephone Co. d/b/a AT&T Missouri's ("AT&T") First 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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(512) 476-8591
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Attorneys for Complainant

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 and U.S. First Class Mail on April 11, 2011.

Robert Gryzmala
One AT&T Center, Room 3516
St. Louis, Missouri 63101
(314) 235-6060
(314) 247-0014 - facsimile
robert.gryzmala@att.com

s/ Chris Malish
Christopher Malish

NEXUS' RESPONSES TO AT&T MISSOURI'S FIRST DATA REQUESTS

DATA REQUEST NO. 1: Please state the name and address of each person having personal knowledge of any of the facts or circumstances alleged in the Complaint filed by you with the Missouri Public Service Commission.

RESPONSE:

Steven Fenker
President
Nexus Communications, Inc.
c/o Counsel for Nexus

Mark Deek
CTO
Nexus Communications, Inc.
c/o Counsel for Nexus

Thad Pellino
Smart Telecom Concepts, LLC
2300 Cabot Drive, Suite 410
Lisle, IL 60532
(630) 245-9070

DATA REQUEST NO. 2: Please identify each and every AT&T Missouri cash-back promotion to which the Complaint relates and the number of Nexus customers that Nexus believes qualified for each promotion identified.

RESPONSE:

See attached tariff sheets and/or accessible letters published by AT&T in Exhibit 1.

Please see also, the attached disk containing a file labeled Data Request No. 2.zip. This file contains the actual dispute forms with the requested detail that were submitted to AT&T via its Exclaim Dispute web portal.

DATA REQUEST NO. 3: For each cash-back promotion identified in your response to Data Request No. 2, please identify the beginning and ending dates of each promotion, the dollar amount associated with each promotion, the dollar amount received by Complainant from AT&T Missouri, and the dollar amount that Complainant believes it should have received from AT&T Missouri, and identify and produce each bill or other invoice (together with Billing Account Number or "BAN") rendered by AT&T Missouri to Nexus which reflects the promotional credit(s) challenged or otherwise disputed by Nexus in this case.

RESPONSE:

Please see the response to Data Request No. 2, which is incorporated herein by reference the same as if set forth at length.

DATA REQUEST NO. 5: Please identify and produce all documents in Complainant's possession, custody, or control that reference, refer to or pertain to each and/or all of Complainant's requests for cash-back promotional credits.

RESPONSE:

Please see the responses to Data Requests No. 2 and 4, which are incorporated herein by reference the same as if set forth at length.

Please see also, the attach disk containing a file labeled Data Request No. 5 Service Order Detail by WTN.xls.

DATA REQUEST NO. 6: Please provide copies of all local service requests and/or service orders which Complainant provided to AT&T Missouri that reference, refer to or pertain to any of the orders on which Complainant alleges that promotional credits were not properly applied.

RESPONSE:

Please see the responses to Data Requests No. 2 and 4, which are incorporated herein by reference the same as if set forth at length.

DATA REQUEST NO. 7: For each promotion identified in your response to Data Request No. 2, please describe the process, procedure or other mechanism Complainant used (or uses) to ensure that its requests to AT&T Missouri for cash-back promotional credits complied (or comply) with all end user eligibility and other requirements for the respective promotion, and produce all documents in Complainant's possession, custody, or control referencing, referring or pertaining to each such process, procedure or other mechanism and/or the results thereof when applied to the respective promotion.

RESPONSE:

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

Please note that the amounts Nexus seeks are tied to orders for services subject to promotions *which have already been acknowledged to be valid and paid in part by AT&T*. The issue is thus not one of attempting to identify orders *qualifying* for a particular promotion, but rather the issue is one of *underpayment for orders previously acknowledged as qualifying*.

While there are other orders disputed on grounds of eligibility, *those orders whose eligibility were disputed are not a part of this case*; they were purposefully left out of the present case by Nexus in order to simplify the issues presented to the Commission for resolution.

Consequently, the issue before the Commission is simply what **amount** Nexus should have recovered in every instance where it qualified for a cash back promotion – not whether Nexus' orders qualified for the promotion in the first instance.

Because it is 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.

Subject to the forgoing objection, AT&T publishes all eligibility requirements, either via its tariff sheets or accessible letters, and further makes the final determination of compliance with all end user eligibility and other requirements for the respective promotions. Nexus has met these requirements as shown by AT&T granting a portion of the value of every promotional credit request currently in this case.

DATA REQUEST NO. 8: For each promotion identified in your response to Data Request No. 2, please produce all documents in Complainant's possession, custody, or control which demonstrate or otherwise reflect that those end users to whom you offered the promotion were eligible and qualified for the promotion based on the criteria stated in the promotional tariff's terms and conditions, including but not limited to (a) notes prepared regarding conversations had between you (or your representative(s)) and end users, and (b) documents provided to you (or your representative(s)) by end users.

RESPONSE:

Objection. This data request is irrelevant and not calculated to lead to the discovery of admissible evidence. Please see the objection to Data Request No. 7, which is incorporated herein by reference the same as if set forth at length.

Subject to the forgoing objection, Nexus placed the appropriate promotion code on the order for service as prescribed by AT&T, to request cash back promotional credits. AT&T publishes all eligibility requirements, either via its tariff sheets or accessible letters, and further makes the final determination of compliance with all end user eligibility and other requirements for the respective promotions. Nexus has met these requirements as shown by AT&T granting a portion of the value of every promotional credit request currently at issue.

DATA REQUEST NO. 9: For each promotion identified in your response to Data Request No. 2, please produce all documents in Complainant's possession, custody, or control which demonstrate or otherwise reflect that those end users to whom you offered the promotion were not eligible and qualified for the promotion based on the criteria stated in the promotional tariff's terms and conditions, including but not limited to (a) notes prepared regarding conversations had between you (or your marketing or sales representative(s)) and end users, and (b) documents provided to you (or your marketing or sales representative(s)) and end users,

RESPONSE:

Objection. This data request is irrelevant and not calculated to the lead to the discovery of admissible evidence. Please see the objection to Data Request No. 7, which is incorporated herein by reference the same as if set forth at length.

DATA REQUEST NO. 10: For each promotion identified in your response to Data Request No. 2, please describe in detail all efforts and measures you undertook to make existing and/or potential end user customers aware of the promotion, and produce all documents in Complainant's possession, custody, or control which reference, refer to or otherwise pertain to each such effort and/or measure undertaken, including but not limited to marketing materials, sales materials, brochures, pamphlets, post cards, bill boards, media messaging/advertising, etc.

RESPONSE:

Objection. This data request is irrelevant and 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 obligation under 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 (information about Nexus' relations with *third parties*) is not relevant, since it inquires about issues that are not of consequence to the determination of whether *AT&T* has made the same offer it extends to *AT&T's retail customers* available to Nexus and whether it has done so at the effective retail rate less avoided costs.

Because it is 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.

DATA REQUEST NO. 11: Identify any third party entity that Complainant used (or uses) to place orders with AT&T Missouri on behalf of Complainant or to review and/or authorize payment of AT&T Missouri's bills to Complainant, and with respect to each such person identified, please provide a copy of the contract and any other document relating to the relationship between Complainant and the third party entity and any document that describes the work performed by the third party entity on behalf of Complainant.

RESPONSE:

Objection. This data request is irrelevant and not calculated to the lead to the discovery of admissible evidence. Furthermore, the contract requested is confidential and contains proprietary trade secret material, including pricing information, which the parties to the contract shield from their competitors.

Subject to the forgoing objection, the third party entity that Nexus used/uses to review AT&T Missouri's bills is:

Smart Telecom Concepts, LLC
2300 Cabot Drive, Suite 410
Lisle, IL 60532
(630) 245-9070

DATA REQUEST NO. 12: With respect to each third party entity identified in the response to Data Request No. 11, please identify the persons employed by that entity with whom Complainant interfaces.

RESPONSE:

Objection. This data request is irrelevant and not calculated to lead to the discovery of admissible evidence. Please see the objection to Data Request No. 11, which is incorporated herein by reference the same as if set forth at length.

Subject to the forgoing objection, the person employed by the third party entity identified in that response is Thad Pellino.

DATA REQUEST NO. 13: When Complainant receives a cash-back promotional discount from AT&T Missouri, how much (if any) of the promotional discount does Complainant pass on to its end user customers? If any less than the full amount of the promotional discount is passed on, explain why the full amount is not passed on.

RESPONSE:

Objection. This data request is irrelevant and 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 obligation under 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 (information about Nexus' relations with *third parties*) is not relevant, since it inquires about issues that are not of consequence to the determination of whether *AT&T* has made the same offer it extends to *AT&T's retail customers* available to Nexus and whether it has done so at the effective retail rate less avoided costs.

The FCC rules on resale are found in the Code of Federal Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

47 CFR § 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.

Accordingly, the only information relevant to determining whether AT&T has met its obligations under the FTA 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 to whether AT&T makes its retail offers available to resellers. Instead, AT&T seeks information about *Nexus' interactions with third parties* – Nexus' customers, which is utterly irrelevant and inadmissible in this case.

Because it is 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.

DATA REQUEST NO. 14: Please describe the process by which Complainant passes amounts described in Data Request No. 13 on to its end user customers and produce all documents in Complainant's possession, custody, or control that reference, refer to or pertain to such process.

RESPONSE:

Objection. This data request is irrelevant and not calculated to the lead to the discovery of admissible evidence. Please see the objection to Data Request No. 13, which is incorporated herein by reference the same as if set forth at length.

DATA REQUEST NO. 15: If successful in this case, does Complainant intend to pass on to its end user customers any amounts recovered that represent additional promotional discounts? If not, why not?

RESPONSE:

Objection. This data request is irrelevant and not calculated to the lead to the discovery of admissible evidence. Please see the objection to Data Request No. 13, which is incorporated herein by reference the same as if set forth at length.

DATA REQUEST NO. 16: Please identify each and/or all of AT&T Missouri's representatives with whom Complainant has corresponded orally regarding Complainant's requests for cash-back promotional credits and/or the subject matter of the Complaint, and please separately identify each and/or all of AT&T Missouri's representatives with whom Complainant has corresponded in writing regarding Complainant's requests for cash-back promotional credits and/or the subject matter of the Complaint. With respect to each such oral/written correspondence, please produce all documents in Complainant's possession, custody, or control that reference, refer to or pertain to such correspondence.

RESPONSE:

Apart from communications between attorneys for Nexus and AT&T, all correspondence regarding disputes over the promotions were filed electronically using AT&T's Exclaim Dispute web portal as prescribed by AT&T. Any resolutions received back from AT&T regarding the disputes were also from AT&T's Exclaim Dispute web portal.

DATA REQUEST NO. 17: Please state specifically and in detail the financial losses Nexus believes it has incurred that were caused by the AT&T Missouri based on the allegations of the



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General Attorney

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December 8, 2010

Steven Fenker, President
Nexus Communications, Inc.
3629 Cleveland Ave., Ste. B
Columbus, OH 43224

Re: questionable claims for mover's promotion

Dear Mr. Fenker:

AT&T's records indicate that, between January 1 and September 30, 2010, Nexus Communications, Inc. ("Nexus") submitted at least 12,925 claims for the Cash Back Rewards Promotion for Residential End Users ("Mover's Reward Promotion"). AT&T has serious concerns about the legitimacy of the claims submitted by Nexus and this letter is intended to seek prompt resolution of those concerns.

The Accessible Letters clearly indicate that the Mover's Reward Promotion is available only in instances in which actual residential moves for the end users occur. This applies to existing end users who are moving and who transfer their existing service to a new service address; it also applies to new end users who are moving and who purchase new local service at a new service address.¹

Nexus' claims for the Mover's Reward Promotion, which Nexus submitted via LSRs (Local Service Requests), have resulted in credits to Nexus totaling at least \$307,992.00 in the Midwest Region, and at least \$99,847 in the Southwest Region. AT&T's investigation has revealed that Nexus has sought the promotion on more than 82% of its LSRs (9,624 claims) in the Midwest Region, and 100% of its LSRs (3,301 claims) in the Southwest Region.² Nexus' high percentage of claims for the Mover's Reward Promotion is a primary reason for our concerns.

Please be advised that AT&T continues to investigate this matter given the above noted concerns. Given the serious nature of the current situation, Nexus should retain all information and records associated with this matter.

AT&T wishes to afford Nexus an opportunity to demonstrate that its promotion requests have been submitted properly. In order to do so, with respect to each and every request for the Mover's Reward Promotion that Nexus has submitted, Nexus

¹ See Movers Rewards Promotion terms and conditions, Accessible Letters CLEC09-517, CLEC10-258, CLEC08-028, CLEC07-374, CLEC09-032, CLEC08-469, CLEC08-452, CLEC08-448, CLEC09-516, CLEC09-518, CLEC09-516, CLEC09, CLEC10-033, CLEC10-259, CLEC10-261 and CLEC10-245. Accessible Letter CLEC10-258 is attached as a representative example.

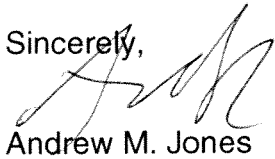
² All of the figures noted in this letter – that being number of claims submitted, dollars credited, percentages, and so forth – are subject to revision.

should provide: (1) verifiable disconnection ("D") orders from an end user's prior service provider; (2) a verifiable prior address for the end user; or (3) other verifiable evidence that the end user moved. This information should be provided no later than December 23, 2010. Nexus should contact Robert Zawilinski in this regard, at (214) 858-0184 or rz1414@att.com, or Nexus' legal counsel may contact the undersigned.

Should Nexus fail to respond as set forth above, AT&T will assume that Nexus does not have evidence to support its claims for the Movers Reward Promotion and that accordingly, they are invalid. AT&T reserves the right to take appropriate legal action against Nexus in regard to this matter.

We look forward to your prompt response, and we stand willing to discuss arrangements for the reimbursement to AT&T of improperly extended claims.

Sincerely,

A handwritten signature in black ink, appearing to read "AMJ", is written over the word "Sincerely,".

Andrew M. Jones

Attachment