

**BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION**

NEXUS COMMUNICATIONS, INC.)	
)	
v.)	CASE NO. TC-2011-0132
)	
SOUTHWESTERN BELL TELEPHONE)	
COMPANY D/B/A AT&T MISSOURI)	

**NEXUS COMMUNICATIONS, INC.’S RESPONSE
TO AT&T’S MOTION TO DISMISS**

COMES NOW, Nexus Communications, Inc. (“Nexus”), by and through its attorneys, and brings this response to Southwestern Bell Telephone Company d/b/a AT&T Missouri’s (“AT&T”) Motion to Dismiss (“Motion”). For the reasons set forth below, Nexus respectfully requests that the Missouri Public Service Commission (“Commission”) deny AT&T’s Motion.

I. INTRODUCTION

1. AT&T asserts three grounds upon which it claims the Commission should grant its Motion:

(1) Nexus has failed to comply with the Commission’s Rule requiring the filing of a notice of intent to file a contested case, (2) Nexus has failed to comply with the Commission’s Rule governing attorneys who seek to practice before the Commission, and (3) Nexus has failed to comply with the requirements of its Interconnection Agreement to invoke and exhaust the Agreement’s dispute resolution provisions.

2. Nexus brings this response to show that (1) it has not failed to comply with the Commission Rule requiring the filing of a notice of intent to file a recorded case and further that the Commission Rule does not apply in the instant matter, (2) it has fully complied with the Commission’s Rule governing attorneys who seek to practice before the Commission, and (3) it has not failed to comply with the requirements of the dispute resolution provisions of the parties’

interconnection agreement (“ICA”).¹ Accordingly, AT&T’s Motion should be denied.

II. NEXUS’ RESPONSE TO MOTION

A. Commission’s Rule Requiring the Filing of a Notice of Intent to File a Contested Case Does Not Apply in the Instant Matter.

3. AT&T contends that the instant matter should be dismissed because Nexus allegedly did not comply with Commission Rule 4.020(2) (4 CSR 240-4.020(2)) which 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 commission.

4. Furthermore, AT&T contends that the instant matter must be dismissed in accordance with Commission Rule 4.020(2)(A) (4 CSR 240-4.020(2)(A)) which states “[a]ny case filed which is not in compliance with this section shall not be permitted and the secretary of the commission shall reject any such filing.”

5. The purpose, however, of Commission Rule 4.020 (4 CSR 240-4.020) Ex Parte and Extra-Record Communications is

To set forth the standards to promote the public trust in the commission with regard to pending filings and cases. This rule regulates communication between the commission, technical advisory staff, and presiding officers, and anticipated parties, parties, agents of parties, and interested persons regarding substantive issues that are not part of the evidentiary record.

Thus, Commission Rule 4.020 (4 CSR 240-4.020) is not intended to regulate communication that is part of the evidentiary record. Given that an original complaint is the genesis of an evidentiary record, Nexus’ Original Complaint is by its very definition not outside the evidentiary record and Commission Rule 4.020 (4 CSR 240-4.020) does

¹ See Interconnection Agreement at issue in Case No. TK-2006-0044, as approved by the Commission on August 5, 2005, and effective on August 11, 2005, and deemed selected by Nexus. See also, Case No. TO-2005-0336, Item No. 262, Notice Regarding CLECs That Have Not Selected An ICA, as filed on October 24, 2005.

not apply in the instant matter. Therefore, AT&T's Motion should be denied.

6. In the alternative, the Commission accepted Nexus' Original Complaint and itself issued a Notice of Contested Case to AT&T.² If AT&T's position regarding Commission Rule 4.020(2)(A) *supra* was correct, the Commission would have not opened an evidentiary record and issued notice of the complaint. To the contrary, the Commission would have rejected Nexus' filing. Clearly, the Commission opened the record and did not reject Nexus' filing. Therefore, Commission Rule 4.020(2) does not apply in the instant matter and AT&T's Motion should be denied.

7. Again in the alternative, Commission Rule 4.020(2)(B) (4 CSR 240-4.020(2)(B)) states "[a] party may request a waiver of this section for good cause." A waiver of Commission Rule 4.020(2), if the Commission Rule even applies to the instant matter, should be granted given that the Commission has already opened the record and issued AT&T a notice of the contested case.³ However, if necessary, Nexus hereby requests a waiver from Commission Rule 4.020(2) for good cause such that the Commission has opened the record, did not reject Nexus' filing, and further issued notice of the contested case. Therefore, Commission Rule 4.020(2) should be waived, if it applies, and AT&T's Motion should be denied.

8. Also in the alternative, Nexus filed its complaint in order to toll the 24-month statute of limitations on its claims for promotional credits due from AT&T and as such is good cause to waive Commission Rule 4.020(2). To enforce Commission Rule 4.020(2) upon Nexus would cause Nexus further harm by effectively barring its recovery from AT&T an additional two months' worth of promotional credits. Such a result is not the purpose of Commission Rule 4.020(2), as discussed *supra*, and would be counter to public policy. Therefore, if necessary,

² See Notice of Contested Case issued by the Commission on November 9, 2010.

Nexus hereby requests a waiver from Commission Rule 4.020(2) for good cause such that Nexus would suffer additional harm by being precluded from recovery from AT&T which is both contrary to the purpose of Commission Rule 4.020(2) and public policy. Again, Commission Rule 4.020(2) should be waived, if it applies, and AT&T's Motion should be denied.

B. Nexus Has Complied with the Commission's Rule Governing Attorneys Who Seek to Practice Before the Commission.

9. AT&T contends that Nexus has not complied with Commission Rule 2.040(3)(C) (4 CSR 240-2.040(3)(C)) which governs the requirements applicable to attorneys who are not members of the Missouri Bar but who seek to practice before the Commission. This is simply not true.

10. Lead counsel for Nexus, Mr. Christopher Malish, has filed in a separate pleading a statement identifying each court of which he is a member and certified that neither he nor any member of his firm is disqualified to appear before any of the same courts.⁴ Mr. Malish designated Mr. Mark Comley, a member in good standing with the Missouri Bar, as associate counsel.⁵ Furthermore, Mr. Comley entered an appearance as an attorney of record on December 3, 2010.⁶ Therefore, Nexus has complied with Commission Rule 2.040(3)(C) and AT&T's Motion should be denied.

C. Nexus Has Complied with the Requirements of its Interconnection Agreement to Invoke and Exhaust the Agreement's Dispute Resolution Provisions.

11. Lastly, AT&T contends that Nexus has not complied with the dispute resolution process stated in the parties' ICA. Again, this is an inaccurate contention and AT&T's Motion

³ *Id.*

⁴ *See* Petition for Admission Pro Hac Vice filed with the Commission on December 9, 2010, and served to AT&T via facsimile and U.S. Mail on December 8, 2010.

⁵ *Id.*

⁶ *See* Entry of Appearance filed with the Commission on December 3, 2010.

should be denied.

12. Section 10.2 of the ICA entitled “Alternative to Litigation” provides in Section 10.2.1 that

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.

Furthermore, Section 10.3 of the ICA entitled “Commencing Dispute Resolution” provides in 10.3.1 that

Dispute Resolution shall commence upon one Party’s receipt of written notice of a controversy or claim arising out of or relating to this Agreement or its breach. No party may pursue any claim unless such written notice has first been given to the other Party. There are three (3) separate Dispute Resolution methods:

10.3.1.1 Service Center . . . ;

10.3.1.2 Informal Dispute Resolution; and

10.3.1.3 Formal Dispute Resolution. . . .

Nexus has complied with the dispute resolution process stated in the ICA and AT&T’s Motion should be denied.

13. First, Nexus has properly applied for all promotional credits available (but not provided by AT&T to Nexus) on each new order submitted to AT&T using the order procedures prescribed by AT&T. A request for promotional credit is, on its face, a dispute regarding the price of the product or service involved. Furthermore, 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 ICA entitled “Service Center Dispute Resolution.”⁷ Thus, by the very nature of its order procedures, AT&T has knowledge of both the

⁷ *Id.*

promotional credit requested and the resulting dispute regarding the price of the service. Here, Nexus has followed the ordering procedures prescribed by AT&T for both ordering service and for requesting all available promotional credit on same; therefore, Nexus has also properly disputed the price according Section 10.4. However, AT&T has not provided for the full promotional credit amount for any new order received from Nexus. Because Nexus complied with the Service Center dispute resolution method, AT&T's Motion should be denied.

14. In the alternative, Nexus has filed actual dispute claims with AT&T according to Section 10.4 of the ICA.⁸ Because Nexus has complied with the Service Center dispute resolution method, AT&T's Motion should be denied.

15. Second, any attempt at informal dispute resolution between counsel for Nexus and AT&T is essentially futile. The instant matter in Missouri is only one dispute out of 15 that are currently or soon to be underway between the parties regarding identical claims. Furthermore, AT&T has been involved in litigation in approximately 12 other substantively identical pending cases in various jurisdictions with a number of other competitive local exchange carriers ("CLECs") similar to Nexus for many months.⁹ Because AT&T cannot compromise its position with Nexus in Missouri without adversely affecting its litigation stance in the many other pending cases, there is no reason to expect the parties to reach an agreement via informal dispute resolution. Furthermore, counsel for Nexus represents other CLECs in these cases, some of which are in jurisdictions that likewise require an attempt at informal resolution prior to bringing

⁸ *Id.*

⁹ See 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-863, 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.

a formal complaint. These cases exist precisely because AT&T and CLECs cannot agree on the resolution of the polarizing issue only now being brought in Missouri. Therefore, there is no reason to believe that informal resolution would result in AT&T adopting a different position in the instant matter and thus AT&T's Motion should be denied.¹⁰

16. Third, by virtue of receiving the Commission's Notice of Contested Case, *supra*, AT&T has received written notice of Nexus' intent to pursue its claims. Section 10.6 of the ICA prescribes no method, manner, or provider of notice other than it be written notice. Because the Commission's notice to AT&T is written notice of Nexus' intent to pursue claims, Nexus has complied with the Formal Dispute Resolution method and AT&T's Motion should be denied.

WHEREFORE, PREMISES CONSIDERED, based upon the foregoing, Nexus respectfully requests and prays the Missouri Public Service Commission deny AT&T's Motion and further issue a ruling such that Nexus is entitled to recover all promotional credits due and any other such relief as it is entitled to in law and equity.

Respectfully submitted,

/s/ Mark W. Comley

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¹⁰ In any event, the proper remedy for a party's failure to seek informal resolution of the matter prior to filing a complaint with the Commission is an abatement of the proceedings – not unilateral dismissal.

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 20th day of December, 2010, to:

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Office of Public Counsel at opcservice@ded.mo.gov;
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/s/ Mark W. Comley
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