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| NEXUS COMMUNICATIONS, INC. |) | |
| |) | |
| Complainant |) | |
| |) | |
| v. |) | Case No. TC-2011-0132 |
| |) | |
| SOUTHWESTERN BELL TELEPHONE |) | |
| COMPANY D/B/A AT&T MISSOURI |) | |
| |) | |
| Respondent |) | |

Comes now Nexus Communications, Inc. (Nexus), by and through its attorneys, and pursuant to Section 386.500 RSMo¹ and 4 CSR 240-2.160, moves and applies for rehearing of the Missouri Public Service Commission's (Commission) *Order Dismissing Complaint Without Prejudice* entered in this case on January 26, 2011 (hereinafter "the Order"). In support thereof, Nexus states the following to the Commission:

2. As explained in greater detail below, the Order is unlawful, unjust and unreasonable and just grounds exist for the Commission to rehear the matter and enter a new order reinstating the complaint.

¹ All statutory citations are to the current revision of RSMo, as supplemented, unless otherwise indicated.

A. **Dismissal of the complaint for failure to comply with the notice requirement of 4 CSR 240-4.020 unlawfully interferes with Nexus' statutory right to bring a complaint.**

3. Nexus' right to submit complaints to the Commission is established in Section 386.390 RSMo:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

4. The grounds and procedures for complaints filed at the Commission are generally provided for in Section 386.400:

Any corporation, person or public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, **and the same procedure shall be adopted and followed as in other cases**, except that the complaint may be served upon any parties designated by the commission. [emphasis supplied]

5. The Commission's interpretation and application of 4 CSR 240-4.020 in this matter, and the Commission's failure to discern good cause for its waiver---or failure to discern good cause to exempt Nexus from its provisions--- violates Nexus' right to the same procedures before this body in the disposition of complaints that are afforded other parties.

6. As Nexus has pointed out in previous pleadings, the purpose of 4 CSR 240-4.020 is:

[t]o 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.

The rule is not intended to regulate or delay communication that is part of the evidentiary record such as the initial pleading in a complaint case. This alone is sufficient cause for the Commission to rehear and reverse the Order. The Commission has mistakenly applied the rule to complaints.

7. Furthermore, the Commission has grafted a new purpose on the rule that is unintended by its provisions. The Commission has applied the rule to impede a regulated utility's right to seek relief by complaint. Assuming for argument only that 4 CSR 240-4.020 is applicable to complaints, which Nexus denies, the Commission has created a procedure for disposition of a complaint filed by a public utility (a regulated entity) that is different from those for corporations and persons that are not regulated. The rule does not require an unregulated entity or individual to submit a notice of intent to file a complaint. Nexus is entitled to the same procedures in filing complaints at the Commission. The Commission's imposition of this new notice procedure on Nexus before it may file a complaint is impermissible under Section 386.400.

8. The Order is unlawful. It should be reversed by the Commission and Nexus' complaint reinstated.

B. The Commission abused its discretion, and was therefore arbitrary and capricious, in refusing to grant Nexus a waiver of 4 CSR 240-4.020.

9. According to page 8 of the Order, the Commission expected Nexus, in support of its request for waiver, to offer evidence of the claims which it contended were forfeit if the waiver of 4 CSR 240-4.020 were not granted. This matter has never been set for hearing at which evidence might be submitted. Nexus is being penalized for not offering evidence at a hearing the Commission never convened. This is unreasonable and fundamentally unfair.

10. For purposes of this application for rehearing, and in support of a rehearing at which evidence may be adduced, Nexus states that if the waiver is not granted, and the complaint is delayed by 60 to 120 days from November 5, 2010, the date it was first filed, Nexus will lose its claim to approximately \$75,000 in promotional credits. An affidavit will be filed in support of this paragraph in several days. The rule is now being applied not to address unlawful or unethical communication between the Commission and the parties, but rather to deprive a claimant from relief in full for breach of its agreement with AT&T.

11. The Commission has circumscribed the meaning of “good cause” in rendering its Order. The examples the Order supplies for “good cause” are inapplicable to this case. Nexus notes that the Commission has not defined “good cause” for purposes of this or its other rules. Normally, where the definition of a term is undefined in a statute or regulation, its common law meaning, if available, would apply:

[Under the common law, t]he meaning of the concept of ‘good cause’ appears to vary to some extent according to the context in which the issue arises. Good cause has been defined as ‘a cause or reason sufficient in law: **one that is based on equity or justice or that would motivate a reasonable man under all the circumstances.**’ *State v. Davis*, 469 S.W.2d 1, 5 (Mo.1971) (quoting Webster’s Third New International Dictionary). Generally, the term ‘good cause’ necessarily implies reasonableness and good faith. [emphasis added]

Morgan v. Gaeth 273 S.W.3d 55, 59 (Mo.App. W.D.,2008)

12. No unlawful communications have been exchanged between the Complainant and the Commission. The record is free of any contention that unlawful communications have been exchanged between either party to the complaint and the Commission. The complaint has been on file for over 60 days. AT&T has answered the complaint and asserted its affirmative defenses. The issues have been joined.

13. There is serious doubt that 4 CSR 240-4.020 applies to complaints. If it does, it is uneven in its application with respect to regulated entities and those persons and corporations that are unregulated. It suffers from unlawfulness. See, Section 386.400. Because of the limitations period established in the interconnection agreement, Nexus stands to lose its right to collect approximately \$75,000 in promotional credits, not because of the merits of AT&T's defenses but on the basis of a rule designed to prohibit ex parte communication. AT&T, despite repeated opportunities to do so, has not claimed any prejudice or harm from absence of an advance notice from Nexus concerning the filing of the complaint.²

14. For these reasons, equity, fairness and the interest of justice, concepts which should inarguably motivate a reasonable man, would be served if 4 CSR 240.4.020 were waived in this matter. Nexus requested a waiver on the basis of these concepts and submits that under the common law, they are sufficiently good to form cause to waive the rule. The Commission has acted capriciously and arbitrarily, and has abused its discretion in denying the waiver.

WHEREFORE, on the basis of the above and foregoing, Nexus Communications, Inc. respectfully requests that the Commission grant this application for rehearing.

² It should be clear by now to the Commission that AT&T's arguments to dismiss the complaint are designed to minimize its potential liability, not to support the rule. The rule should not be interpreted to afford AT&T this unintended and unjust benefit.

Respectfully submitted,

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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 4th day of February, 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;
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/s/ Mark W. Comley

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