

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Nexus Communications, Inc.,

Complainant,

v.

Southwestern Bell Telephone, L.P.,  
d/b/a AT&T Missouri,

Respondent.

**File No. TC-2011-0132**

## ORDER TO SHOW CAUSE

Issue Date: January 5, 2011

Effective Date: January 5, 2011

The Missouri Public Service Commission is ordering Nexus Communications, Inc., to show good cause for a waiver of the Commission's regulation regarding notice of intent.

### Procedure

This action began when Nexus Communications, Inc., ("Nexus") filed the complaint on November 5, 2010. On December 9, 2010, Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri ("ATT") filing the *Answer and Affirmative Defenses of Southwestern Bell Telephone Company D/B/A AT&T Missouri* ("answer"). Also on that date, ATT filed the *Motion to Dismiss of Southwestern Bell Telephone Company D/B/A AT&T Missouri* ("motion"). On December 20, 2010, Nexus Communications, Inc., ("Nexus") filed *Nexus Communications, Inc.'s Response to AT&T's Motion to Dismiss* ("Nexus's response"). On December 30, 2010, ATT filed the *Reply of Southwestern Bell Telephone Company d/b/a ATT Missouri in Support of Its Motion to Dismiss* ("reply").

## **Findings of Fact**

1. Nexus is a competitive local exchange telecommunications company with its principal place of business at 3629 Cleveland Avenue, Suite C, Columbus, Ohio, 43224.

2. ATT is an incumbent local exchange telecommunications company with its principal place of business at One AT&T Center, 909 Chestnut Street,

3. Nexus and ATT are parties to an interconnection agreement (“agreement”). Under the agreement and federal statutes, ATT made available to its retail customers certain promotional offerings, which are the subject of the complaint.

4. Nexus never filed notice of intent to file the complaint. No prohibited communication about the subject matter of the complaint occurred. On November 5, 2010, Nexus transmitted the complaint to the Commission.

5. The Commission received the complaint, filed it, and assigned it a file number through the Commission’s Data Center. The Data Center’s Staff consists of managerial and clerical personnel whose expertise is the operation of Commission’s electronic filing and information service. On November 9, 2010, the Commission issued a notice of the institution of a contested case.

## **Conclusions of Law**

In the complaint, Nexus seeks an order that ATT owes Nexus promotional credits under federal statutes and the agreement between ATT and Nexus. The filing of such a complaint vests the parties with the right to a pre-decision<sup>1</sup> evidentiary hearing.<sup>2</sup> Therefore, such filing institutes a contested case.<sup>3</sup>

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<sup>1</sup> Section 386.390.5, RSMo 2000.

<sup>2</sup> *Jamison v. Dept. of Soc. Servs.*, 218 S.W.3d 399, 408-09 (Mo. banc 2007); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

<sup>3</sup> Section 536.010(4), RSMo Supp. 2009 and 536.063(1), RSMo 2000.

To dispose of this contested case without an evidentiary hearing ATT sets forth in its answer nine “Affirmative Defenses.” An affirmative defense is one that:

. . . avers that even if the petition is true, the plaintiff cannot prevail because there are *additional facts* which permit the defendant to avoid legal responsibility.” Affirmative defenses are asserted by the pleading of additional facts that are not necessary to support a plaintiff's case but that serve to avoid defendants' legal responsibility even if the plaintiff's allegations are supported by the evidence. [<sup>4</sup>]

The party raising an affirmative defense bears the burden of proving the elements of such affirmative defense.<sup>5</sup>

The elements for dismissal of any action are generally:

A case may be dismissed for good cause found by the commission [; <sup>6</sup>]

and for a complaint are specifically:

The commission, . . . on the motion of a party, may . . . dismiss a complaint for . . . failure to comply with any provision of these rules [<sup>7</sup>]

Good cause means a good faith request for reasonable relief. <sup>8</sup> "May" means an option, not a mandate,<sup>9</sup> and thus signifies Commission discretion. Discretion's bounds are careful consideration, the logic of the circumstances, and justice.<sup>10</sup> Together, the quoted regulations require ATT to show facts—noncompliance with a regulation or other circumstances—for which the fair consequence is dismissal.

Of the nine affirmative defenses in the answer, ATT offers support for three in the motion.

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<sup>4</sup> *DeBaliviere Place Ass'n v. Veal*, (Mo. App., E.D. 2010) (citations omitted).

<sup>5</sup> *Black & Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 127 (Mo. App., W.D. 2009).

<sup>6</sup> 4 CSR 240-2.116(4).

<sup>7</sup> 4 CSR 240-2.070(6).

<sup>8</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. W.D. 1996).

<sup>9</sup> *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).

<sup>10</sup> *Peters v. ContiGroup*, 292 S.W.3d 380, 392 (Mo. App., W.D. 2009).

#### i. Unauthorized Practice of Law

ATT cites the Commission's regulation on the unauthorized practice of law,<sup>11</sup> which provides that a visiting attorney shall file certain documents in accordance with Missouri Supreme Court Rule 9.03. In the answer and motion, ATT alleges that Nexus filed the complaint through counsel not admitted to practice in Missouri. In response, Nexus notes that the required filings were complete on December 9, 2010. By separate order, the Commission has granted "leave to be permitted to appear and participate in" this action. In ATT's reply, ATT does not address the issue. Because no dispute over compliance with the visiting attorney regulation currently exists, the issue is moot,<sup>12</sup> so the Commission will deny the motion as to that basis.

#### ii. The Agreement's Provisions

ATT seeks dismissal under the agreement's dispute resolution terms. Those terms, the parties agree, include the following language.

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.

\* \* \*

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.

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<sup>11</sup> 4 CSR 240-2.040(3)(C).

<sup>12</sup> *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001)(quoting *Shelton v. Farr*, 996 S.W.2d 541, 543 (Mo. App. W.D. 1999)).

But as to whether Nexus has given ATT the required notice, the parties do not agree,<sup>13</sup> and ATT provides no evidence. Therefore, ATT has not carried its burden of proof on that basis for dismissal, and the Commission will deny the motion as to that basis.

### iii. Notice of Intent

ATT also seeks dismissal for failure to comply with Commission regulation on notice of intent.

#### *a. ATT's Arguments*

ATT cites the Commission's regulation on notice of intent, 4 CSR 240-4.020(2):

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.

Nexus filed no such notice of intent though, as noted above, the complaint was likely—if not certain—to be a contested case. Therefore, ATT has shown that Nexus failed to comply with 4 CSR 240-4.020(2).

#### *b. Nexus's Arguments*

Nexus resists that conclusion on several theories but none refutes or excuses Nexus's failure to comply with 4 CSR 240-4.020(2).

Nexus argues that 4 CSR 240-4.020's purpose is to prevent communications outside the record and that a filed document, like a complaint, is not outside the record. Nexus's conclusion is that 4 CSR 240-4.020 does not control the complaint. It is true that a complaint is not communication outside the record, but the Commission's intent is to control such communication through a notice of intent, stating that a complaint is imminent. Nexus did not comply with that requirement.

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<sup>13</sup> Nexus's response, page 6, paragraph 14.

Nexus also cites the Commission's acceptance of the complaint for filing and issuance of a Notice of Contested Case. Nexus argues that such acts constitute a determination that 4 CSR 240-4.020 does not apply. Such a determination would be subject to re-consideration,<sup>14</sup> but neither act constitutes any determination about 4 CSR 240-4.020.

As to acceptance for filing, Commission accepts filings through the Data Center. The Data Center is not equipped to discern the distinctions—which are often subtle enough to challenge experienced counsel—between a non-contested case and a contested case. The Commission does not expect the Data Center to spot a “likely” contested case. Thus, acceptance for filing was at most improvident, not adjudicative. Moreover, a contested case is an adversarial proceeding<sup>15</sup> in which ATT has an interest in raising procedural issues greater than the Commission's.

As to the Notice of Contested Case, the statutes required issuance of such notice<sup>16</sup> on the facts. Those facts were receipt of a writing that “seeks such action as by law can be taken by the agency only after opportunity for hearing.”<sup>17</sup> Issuing the Notice of Contested Case was merely ministerial.

In the alternative, Nexus cites those Commission acts—acceptance of the complaint for filing and issuance of a Notice of Contested Case—in support of a waiver of 4 CSR 240-4.020(2)(B):

A party may request a waiver of this section for good cause.

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<sup>14</sup> 4 CSR 240-2.160(2).

<sup>15</sup> *Ladd v. Missouri Bd. of Probation and Parole*, 299 S.W.3d 33, 38 (Mo. App., W.D. 2009).

<sup>16</sup> Section 536.067(1), RSMo Supp. 2000.

<sup>17</sup> Section 563.063(1), RSMo 2000.

Nexus does not explain how the Commission's acts constitute Nexus's good cause. Nexus also alleges hardship in the form of claims that it will lose to the agreement's time bar if no complaint is pending. But Nexus offers no evidence to support that allegation and the parties do not agree that Nexus has given ATT the notice required under the agreement to preserve its claims. In any event, any loss of claims is due to Nexus's own failure to comply with 4 CSR 240-4.020(2).

Therefore, Nexus has not refuted ATT's showing of failure to comply with 4 CSR 240-4.020.

### *C. Remedy*

The language of 4 CSR 240-4.020(2)(A) provides the following consequence for failure to comply:

Any 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.

Filing has already occurred so no literal enforcement of that provision is possible. But to ignore that provision would reward Nexus's noncompliance more than the compliance of other regulated entities. Nexus failed to comply with a Commission regulation, for which it has offered no good cause, and offers no alternative to ATT's suggestion.

Yet ATT does not allege the occurrence of prohibited communications. Those are the ills against which 4 CSR 240-4.020 provides protection. It does so by requiring a filing that gives notice to the Commission and other persons that certain communications on certain matters are restricted. There is no evidence that such communications occurred. Also, 4 CSR 240-4.020 is of relatively recent publication and

practitioners may not yet fully understand what constitutes a satisfactory showing under its provisions.

Therefore, as to notice of intent, the Commission will reserve ruling on the motion and will order Nexus to show good cause to waive the notice of intent requirement.

**THE COMMISSION ORDERS THAT:**

1. Not later than January 10, 2011, Nexus shall file a response to this order showing good cause to waive the notice of intent requirement of 4 CSR 240-4.020.
2. This order shall be effective upon issuance.

( S E A L )

**BY THE COMMISSION**



Steven C. Reed  
Secretary

Daniel Jordan, Regulatory Law Judge,  
by delegation of authority under  
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 5<sup>th</sup> day of January 2011.