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.	)	

AT&T MISSOURI'S REPLY IN SUPPORT OF ITS 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 2.080(15) (4 CSR 240-2.080(15)) and the Commission's June 3 Order Extending Due Dates, respectfully submits this Reply in support of its Motion to Compel Responses to Data Requests Directed to Nexus Communications, Inc. ("Nexus").

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

1. Nexus' fundamental point – that AT&T Missouri's discovery is irrelevant because this case presents only a single "narrow legal and policy question" (Response, at 1) – is wrong, as it wholly mischaracterizes the nature of this proceeding. Nexus has not merely requested the Commission to clarify or resolve a legal or regulatory policy question, nor is its plea to the Commission nearly as narrow as it suggests. Instead, Nexus filed a formal complaint against AT&T Missouri which, as the Commission recognized early on, "instituted a contested case." Order Dismissing Case Without Prejudice ("Order Dismissing Case"), January 26, 2011, at 3. The Commission has already held that this contested case "vests certain rights in the parties,"

including "the rights of an evidentiary hearing." Order Dismissing Case, at 3-4. Incident to that right is the right to conduct discovery so as to meaningfully and effectively allow AT&T Missouri to exercise its right to an evidentiary hearing. Indeed, Commission Rule 2.090(1) expressly provides that "[d]iscovery may be obtained by the same manner and under the same conditions as in civil actions in the circuit court," and further, that data requests may be used as a means of conducting such discovery. 4 CSR 240-2.090(1).

2. Additionally, Nexus' complaint specifically alleges facts (which AT&T Missouri has specifically denied) to the effect that Nexus "met the same qualifications as AT&T's retail end users." *Compare*, Nexus' First Amended Complaint ("Complaint"), at 5 (para. 9) *with* AT&T Missouri's Answer, at 3 (para. 9). Such factual allegations and their denial create disputed facts, and consequently, disputed legal obligations and liabilities that simply cannot be regarded as the presentation of a mere narrow legal or policy question.

3. Nexus' complaint also specifically alleges dollars-and-cents damages and affirmatively makes a claim that Nexus is entitled to recover such damages from AT&T Missouri. For example, it alleges that "AT&T owes Nexus" over $150,000 "in past due underpaid promotional credits." Complaint, at 6. The complaint's prayer for relief (i.e., its "Wherefore" clause) expressly "requests and prays the Missouri Public Service Commission" not only to "[i]ssue a declaration" but to *also* ""[i]ssue a ruling such that Nexus is entitled to recover all underpaid promotional credits due," *and* "[a]ward Nexus any other such relief as it is entitled to in law or in equity." *Id.*, at 19. Such targeted and specific allegations and prayers for relief are

clearly not as limited as Nexus represents, and their scope entitles AT&T Missouri to conduct discovery.[1]

4. Nexus' response to AT&T Missouri's motion to compel also overlooks the fact that AT&T Missouri stated in its motion that "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*." Motion, at 4. (emphasis original). Nexus does not dispute that these statements regarding Nexus' obligations are well taken.

5. AT&T Missouri also argued in its motion that "Nexus' assertion that it has left [unqualified/ineligible] 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." Motion, at 6. Nexus' response does not rebut this argument. Instead, Nexus merely repeats its initial assertion.

6. Finally, AT&T Missouri's motion also stated that AT&T Missouri had written Nexus on December 8, 2010, regarding the Movers Reward promotion, asking for "verifiable evidence that the end users for which Nexus had submitted service orders to AT&T Missouri had in fact moved." Motion, at 6 and Motion, Exhibit B. Nexus' response does not deny that AT&T Missouri asked Nexus for such evidence. Additionally, in response to AT&T Missouri's

[1] For several reasons, as its Answer makes apparent, AT&T Missouri denies any liability to Nexus for damages. Among them is the fact that, as the Commission has often correctly acknowledged, the Commission "is not a court and has only the authority granted to it by the legislature. The Commission does not have the authority to award damages to [this] or any other claimant, for wrongdoing by a public utility." *Gianella v. Laclede Gas Co.*, GC-2008-0009, Order Dismissing Portion of Complaint Seeking Monetary Damages, at 3, *citing*, State ex rel. Laundry, Inc. v. Pub. Serv. Commission, 34 S.W.2d 37, 46 (Mo. 1931).

statement that "Nexus has not responded to this letter, thus declining the opportunity 'to demonstrate that its promotion requests have been submitted properly,'" *id.*, at 6-7, Nexus once again remains silent.

7. Nexus' resistance to producing the information requested by AT&T Missouri is not justified by the assertion that AT&T Missouri cannot obtain the information other than by pursuing "a case," or, as Nexus puts it, "a different docket following its own track." Response, at 4. As AT&T Missouri previously explained, it is entitled to raise lack of qualification/eligibility as an affirmative defense, it has done so, and the information it has sought by its data requests are directly relevant to the defense. Motion, at 5.

8. Nor is so that, even if AT&T Missouri were to file a complaint case, it would first have to engage in further "dispute resolution" with Nexus before doing filing the complaint. Response, at 4. AT&T Missouri's December, 2010, letter – sent to Nexus' President – spelled out in detail the nature of AT&T Missouri's concerns, and it specifically sought "resolution of those concerns." Motion, Exhibit B. These circumstances demonstrate substantial compliance on AT&T Missouri's part insofar as any dispute resolution obligation is concerned, and it cannot be faulted for Nexus' own decision to not reciprocate by ignoring AT&T Missouri's efforts to reach a resolution.

B. AT&T Missouri's "Pass-Through" Data Requests (DRs 13-15)

9. AT&T Missouri does not disagree that one of the issues in this case is whether it has complied with its resale obligation insofar as cash-back promotional discounts extended to Nexus are concerned. But Nexus is incorrect in asserting that discovery designed to determine

whether Nexus passes these discounts on to its end user customers is irrelevant. Therefore, Nexus' objections to AT&T Missouri's "pass through" data requests should be denied.

10. Nexus does not refute AT&T Missouri's argument that CLECs such as Nexus are afforded resale discounts largely so that they may have "a meaningful opportunity to compete" with ILECs, which is accomplished when CLECs' end users ultimately benefit from the discount. Motion, at 8. Indeed, Nexus twice expressly concedes, as it must, that "the purpose of the Act is to foster and encourage competition" with ILECs. Response, at 10.

11. It is one thing if a CLEC (such as Nexus) receives a cash-back promotional discount from an ILEC, and the CLEC then passes that discount on to its end user customer. In that instance, the customer has received a benefit as a result of the CLEC's having been extended a meaningful opportunity to compete. But where the CLEC does *not* pass that discount on to its end user customer, the same simply cannot be said. Rather, all that can be said is that the CLEC has benefited and that the customer, who has been denied the benefit of the discount, has been denied the benefits of competition. Given this, it is fair to ask – as both a legal and policy matter – whether the CLEC's opportunity to compete has been at all compromised if the facts are that it simply keeps, and does not pass through, the discount it receives from AT&T Missouri, while AT&T Missouri extends the discount to its own end users. AT&T Missouri's data requests are intended to elicit facts regarding this issue, and each request is calculated to lead to the discovery of admissible evidence.

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.

Respectfully submitted,

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D/B/A AT&T MISSOURI

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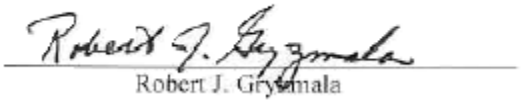
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to each of the below by e-mail on June 23, 2011.



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