

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the 6th
day of July, 2011.

Nexus Communications, Inc.,)	
)	
Complainant,)	
)	
v.)	File No. TC-2011-0132
)	
Southwestern Bell Telephone, L.P.,)	
d/b/a AT&T Missouri,)	
)	
Respondent.)	

**ORDER GRANTING IN PART, AND DENYING IN PART,
AT&T’S MOTION TO COMPEL**

Issue Date: July 6, 2011

Effective Date: July 6, 2011

The Missouri Public Service Commission is granting the *Motion to Compel Responses to Data Requests Directed to Nexus Communications, Inc.* (“the motion”) on Data Requests 7, 8, and 9; and denying the motion as to Data Requests 13, 14, and 15.

A. Background

On November 5, 2010, Nexus Communications, Inc. (“Nexus”) filed the complaint against Southwestern Bell Telephone Company d/b/a AT&T Missouri (“AT&T”). After Nexus and AT&T (“the parties”) telephoned the regulatory law judge (“RLJ”) to alert him

to the discovery dispute,¹ AT&T filed the motion on May 27, 2011. Nexus filed its response to the motion on June 8, 2011, and AT&T filed a reply on June 23, 2011.

In the motion, AT&T challenges Nexus' objections to AT&T's data requests ("DRs"). DRs are an informal discovery device created by Commission regulation:

Parties may use data requests as a means for discovery. [²]

That regulation also provides:

Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. [³]

Those conditions are generally as follows.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. [⁴]

Nexus objects that each DR is not relevant to the subject matter and AT&T cites the discovery rule stating that:

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [⁵]

AT&T has the burden of proof on the motion because:

The party seeking discovery shall bear the burden of establishing relevance [⁶]

¹¹ Staff and OPC are also parties to this action under 4 CSR 240-2.010(11). The parties conveyed Staff's consent to discussing the discovery dispute with the RLJ. Nevertheless, OPC's absence presented an obstacle to resolving the dispute under the Commission's ex parte rule 4 CSR 240-4.020.

² 4 CSR 240-2.090(2).

³ 4 CSR 240-2.090(1).

⁴ Rule 56.01(b)(1). All rules are in the 2011 Missouri Supreme Court Rules.

⁵ *Id.*

⁶ *Id.*

Whether evidence is relevant and otherwise admissible depends on the claims and defenses as set forth in the amended complaint and the answer to the amended complaint.

Those pleadings frame the issues as follows. In the amended complaint, Nexus alleges that AT&T failed to pay to Nexus certain credits due under the parties' interconnection agreement ("agreement"). The agreement provides that AT&T will issue credits to Nexus for qualifying sales from Nexus to certain Nexus customers.

B. Customer Qualification (DRs 7, 8, and 9)

Whether Nexus's sales qualified for credits is the subject of DRs 7, 8, and 9,⁷ which inquire as to Nexus's customers' characteristics.

Such characteristics are relevant to whether credits are due, Nexus suggests⁸, but irrelevant in this action because AT&T has already acknowledged that the sales qualify. In support, Nexus alleges that AT&T partially credited all the sales claimed:

Nexus also attaches Exhibit D which provides 28 spreadsheets containing the raw data detailing the 15,634 promotional credit requests submitted via AT&T's web portal system for the underpaid promotional credits at issue in this dispute. Again, please note these are for orders in which AT&T has *already approved* each and every one of the promotional credit requests, but only disputes the amount due qualifying reseller orders under the promotions at issue.⁹

But in the answer to the amended complaint, AT&T denies that such credits were due:

AT&T admits that Exhibit D as referred to in Paragraph 11 speaks for itself, but denies the accuracy of the information contained on Exhibit D and/or that Nexus is entitled to the amount claimed on Exhibit D. Except as expressly admitted

⁷ Set forth in their entirety, with Nexus's objections, as Appendix A to this order.

⁸ [Nexus]'s Response to [AT&T]'s Motion to Compel, page 2, paragraph 1.

⁹ [Nexus]' Amended Complaint, paragraph 11.

herein, AT&T denies the remainder of the allegations of Paragraph 11.^[10]

And AT&T raises that issue as an affirmative defense:

The 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. ^[11]

AT&T cannot raise that issue, Nexus argues, because Nexus's complaint alone determines the issues and the only issue is a declaration on the formula for calculating credits.

In support of that argument, Nexus offers neither any authority nor even a theory, like estoppel or some other bar. And, contrary to Nexus' assertion, the Commission's regulations give AT&T the right to raise defenses to Nexus's claims:

The respondent shall file an answer to the complaint within the time provided. All grounds of defense, both of law and of fact, shall be raised in the answer. ^[12]

Also, the Commission ordered AT&T to file an answer.¹³ Therefore, whether the claims qualified is at issue.

Further, even if we looked only to the complaint, we would find the issue that AT&T raises. As AT&T notes, Nexus's prayer for relief expressly seeks more than merely a declaration on how the formula works. Nexus asks the Commission for an order:

¹⁰ *Answer and Affirmative Defenses of [AT&T] to the First Amended Complaint of [Nexus]*, page 3, paragraph 11.

¹¹ *Answer and Affirmative Defenses of [AT&T] to the First Amended Complaint of [Nexus]*, page 6, paragraph 7.

¹² 4 CSR 240-2.070(8).Emphasis added.

¹³ *Order Granting Leave to File Amended Complaint and Directing Filing*, issued May 4, 2011.

. . . that Nexus is entitled to recover all underpaid promotional credits due [. ¹⁴]

Nexus has thus already raised the issue of whether credits are due. An order to pay credits not due would be an absurd and unlawful result.

Therefore, the Commission concludes that AT&T has carried its burden of proving that discovery on customer qualification is reasonably calculated to lead to the discovery of admissible evidence. The Commission overrules Nexus' objection. The Commission will grant the motion as to DRs 7, 8, and 9.

C. Pass-Through (DRs 13, 14, and 15)

By contrast, DRs 13, 14, and 15 relate to no claim or defense, so they are not reasonably calculated to lead to the discovery of admissible evidence, because they address only how Nexus uses the discounts. AT&T argues that whether Nexus passes on the savings to Nexus's customers is relevant to "the public interest," which the Commission must use as a standard. That standard appears in the Telecommunications Act of 1996 ("the Act"). ¹⁵

But the Act does not treat Nexus the same as AT&T. When AT&T offers a discount to AT&T's retail customers, AT&T must offer the same discount to Nexus:

[AT&T] shall offer to [Nexus] any telecommunications service that [AT&T] offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates [; ¹⁶]

and:

[AT&T] shall not impose restrictions on the resale by [Nexus] of telecommunications services offered by [AT&T; ¹⁷]

¹⁴ [Nexus]'s First Amended Complaint, page 19.

¹⁵ As authority for this proposition, AT&T cites 47 USC Section 252(e)(2)(A)(ii).

¹⁶ 47 CFR § 51.605(a).

¹⁷ 47 CFR § 51.605(e).

and:

The wholesale rate that [AT&T] may charge for a telecommunications service provided for resale to [Nexus] shall equal the rate for the telecommunications service, less avoided retail costs[.¹⁸]

Neither those provisions, nor any equivalent provisions, apply to Nexus. The Act thus manifests the policy decision of Congress to leave that aspect of Nexus/customer relations between Nexus and its customers. Specific provisions implementing the Act must override general policy considerations. AT&T cites no authority under which the Commission may treat Nexus in a way that the Act does not.

Therefore, the Commission concludes that AT&T has not carried its burden of proving that DRs on pass-through are reasonably calculated to lead to the discovery of admissible evidence. The Commission sustains Nexus' objection. The Commission will deny the motion as to DRs 13, 14, and 15.

THE COMMISSION ORDERS THAT:

1. The *Motion to Compel Responses to Data Requests Directed to Nexus Communications, Inc.* is:

- a. Granted as to Data Requests 7, 8, and 9; and
- b. Denied as to Data Requests 13, 14, and 15.

2. Nexus shall comply with discovery and deliver responses to Data Requests 7, 8, and 9 no later than July 20, 2011.

¹⁸ 47 C.F.R. § 51.607.

3. This order shall be effective immediately upon issuance.

(S E A L)

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. Reed', is positioned above the printed name of the Secretary.

Steven C. Reed
Secretary

Gunn, Chm., Clayton, Davis, and Jarrett, CC., concur;
Kenney, C., abstains.

Jordan, Regulatory Law Judge

Appendix A

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 the lead to the discovery of admissible evidence.

Please note that the amounts Nexus seeks are tied to order 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)) 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 here 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 make 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 documents provided to you (or your marketing or sales representative(s)) and end users, and (b) documents provided to you 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 here by reference the same as if set forth at length.

Appendix B

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.

(1)(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 Date Request No. 13 on to its end user customers and produce all documents in Complainants 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 here 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 no, 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 here by reference the same as if set forth at length.