

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public  
Service Commission held at  
its office in Jefferson City on  
the 26 day of January, 2011.

Nexus Communications, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
Southwestern Bell Telephone, L.P.,	)	
d/b/a AT&T Missouri,	)	
	)	
Respondent.	)	

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

**ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE**

Issue Date: January 26, 2011

Effective Date: February 5, 2011

The Missouri Public Service Commission is dismissing the complaint of Nexus Communications, Inc., ("Nexus") for failure to comply with the Commission's regulation on notice of intent. The Commission is denying Nexus's request to waive the regulation because Nexus has shown no good cause for a waiver. The Commission is not addressing the merits of the complaint.

**Procedure**

This action began when Nexus filed the complaint<sup>1</sup> on November 5, 2010. On December 9, 2010, Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri ("ATT") filed the *Answer and Affirmative Defenses of Southwestern Bell Telephone Company*

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<sup>1</sup> As provided at Section 386.390, RSMo 2000.

*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* (“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”). On January 5, 2011, the Commission ordered Nexus to file a second response showing good cause for a waiver of the notice of intent requirement.<sup>2</sup>

On January 10, 2011, Nexus filed its second response. On January 24, 2011, ATT filed its second reply. Based on admissions in the pleadings, and official notice of the Commission’s file, the Commission makes the following findings of fact.

### **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, St. Louis, MO 63101.

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.

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<sup>2</sup> The Commission overrules ATT’s objection to a second chance for Nexus to show good cause.

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.

6. The Data Center's Staff consists of managerial and clerical personnel whose expertise is the operation of Commission's electronic filing and information service.

7. 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. The filing of that complaint vested the parties with the right to a pre-decision,<sup>3</sup> evidentiary hearing.<sup>4</sup> Therefore, the filing instituted a contested case.<sup>5</sup>

#### **I. Decision without Hearing**

A contested case vests certain rights in the parties. Those rights include the right to present testimony, exhibits, and cross-examination<sup>6</sup>—the rights of an evidentiary

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<sup>3</sup> Section 386.390.5, RSMo 2000.

<sup>4</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>5</sup> Section 536.010(4), RSMo Supp. 2009 and 536.063(1), RSMo 2000.

<sup>6</sup> Section 536.070, RSMo 2000.

hearing. Such rights are subject to waiver,<sup>7</sup> which ATT's motion implicitly includes. But Nexus makes no such waiver and neither party addresses how to dispose of a contested case without an evidentiary hearing in this posture.

ATT sets forth in the answer nine "Affirmative Defenses." In the motion, ATT offered support for three of the affirmative defenses. In the order dated January 5, 2011, the Commission denied the motion as to two of those affirmative defenses. The remaining ground is the subject of this order—dismissal for failure to comply with the Commission's notice of intent regulation.

An affirmative defense is a theory under which facts, unrelated to the elements of complainant's claim, support a decision favorable to respondent even if the complaint's allegations are true.<sup>8</sup> The party raising an affirmative defense has the burden of proof.<sup>9</sup> The burden of proof in an administrative adjudication is ordinarily a preponderance of the evidence,<sup>10</sup> which means the greater weight.<sup>11</sup> That standard accords with other grounds for disposing of a case without reaching the merits, as in lack of subject matter jurisdiction.<sup>12</sup>

An alternative standard appears in the Commission's regulations: summary determination. Under the summary determination standard, the Commission does not weigh the evidence. Instead, the Commission denies the motion on a mere genuine dispute as to any material fact of the affirmative defense.<sup>13</sup> But, even if we hold ATT to that higher standard of summary determination, ATT prevails. That is because Nexus

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<sup>7</sup> Section 536.060, RSMo 2000.

<sup>8</sup> *World Enterprises, Inc. v. Midcoast Aviation Servs. Inc.*, 713 S.W.2d 606, 608 (Mo. App. E.D.1986).

<sup>9</sup> *Black & Veatch Corp. v. Wellington Syndicate*, 302 S.W.3d 114, 127 (Mo. App., W.D. 2009).

<sup>10</sup> *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

<sup>11</sup> *Id.* at 642.

<sup>12</sup> *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo.,2003) (citations omitted).

<sup>13</sup> 4 CSR 240-2.117(1)(E).

has offered no evidence at all, neither to weigh against nor to raise a genuine dispute, as to ATT's evidence on the facts material to its theory.

The material facts are not those of Nexus' claim because Nexus' claim is not the subject of the motion. The motion addresses ATT's affirmative defense.<sup>14</sup> The facts material to dismissal, for any action generally, are:

A case may be dismissed for good cause found by the commission [; <sup>15</sup>]

and, for a complaint specifically, are:

The commission, . . . on the motion of a party, may . . . dismiss a complaint for . . . failure to comply with any provision of these rules [. <sup>16</sup>]

Those terms have meanings as follows.

Good cause means a good faith request for reasonable relief. <sup>17</sup> "May" means an option, not a mandate,<sup>18</sup> and thus signifies Commission discretion. Discretion's bounds are careful consideration, the logic of the circumstances, and justice.<sup>19</sup>

Therefore, the Commission will not dismiss the complaint unless ATT establishes facts—noncompliance with a regulation or other circumstances—for which the fair consequence is dismissal and challenge Nexus to raise at least a genuine issue as to the material facts.<sup>20</sup>

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<sup>14</sup> Moreover, under any standard, the result will be the same because Nexus has offered no evidence in support of its allegations—none for the Commission to weigh and none to raise a genuine issue.

<sup>15</sup> 4 CSR 240-2.116(4).

<sup>16</sup> 4 CSR 240-2.070(6).

<sup>17</sup> *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. W.D. 1996).

<sup>18</sup> *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).

<sup>19</sup> *Peters v. ContiGroup*, 292 S.W.3d 380, 392 (Mo. App., W.D. 2009).

<sup>20</sup> *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993). That case discusses Missouri Supreme Court Rule 74.04, to which our regulation on summary determination is sufficiently similar to make cases interpreting the rule helpful. *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 626 (Mo. App., W.D. 2004).

## II. Notice of Intent

ATT seeks dismissal as a sanction for failure to comply with Commission regulation regarding notice of intent.

### *a. Non-Compliance*

The facts material to ATT's theory are in the Commission's regulation on notice of intent, 4 CSR 240-4.020(2). That regulation is the result of the General Assembly's express mandate:

For the development of a rule regarding ethics, conduct and conflict of interest, including training for the commission and staff, in consultation with a professional legal organization with expertise in the development and training in such codes[.<sup>21</sup>]

The regulation provides:

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.[<sup>22</sup>]

As noted above, the complaint was likely—if not certain—to be a contested case. Nevertheless, as the file shows and Nexus agrees, Nexus filed no notice of intent. Therefore, ATT has established that Nexus failed 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 alleges that no prohibited communication occurred. Therefore, Nexus concludes, no relief is justified. But Nexus emphasizes the wrong part of the regulation's purpose.

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<sup>21</sup> Section 7.205, C.C.S. for S.C.S. for H.C.S. for H.B. 2007, 94<sup>th</sup> Mo. Gen. Assem. 2<sup>nd</sup> Reg. Sess.; 2008 Mo. Laws 134 at 142.

<sup>22</sup> 4 CSR 240-4.020(2).

Damages are not an element of dismissal under either quoted dismissal regulation. The quoted provisions of 4 CSR 240-4.020 emphasize prevention and have the force of law whether prohibited communication occurs or not. Moreover, Nexus's non-compliance and failure to offer good cause has led to the expenditure of resources on this matter by ATT and the Commission.

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>23</sup> but no determination about 4 CSR 240-4.020 appears in any act of the Commission.

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.

As to the Notice of Contested Case, the statutes required issuance of such notice<sup>24</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>25</sup> Issuing the Notice of Contested Case was merely ministerial.

Therefore, Nexus has not raised a genuine dispute as to failure to comply with 4 CSR 240-4.020.

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<sup>23</sup> 4 CSR 240-2.160(2).

<sup>24</sup> Section 536.067(1), RSMo Supp. 2009.

<sup>25</sup> Section 563.063(1), RSMo 2000.

*b. Waiver*

In the alternative, Nexus cites 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.” Nexus does not explain how the Commission’s subsequent acts are good cause for Nexus’s prior non-compliance.

Moreover, a contested case is an adversarial proceeding.<sup>26</sup> The interest in raising the complaint’s deficiencies is with ATT. The Commission’s neutrality is not good cause to ignore the Commission’s regulations.

Nexus also repeatedly alleges hardship in the form of claims that it will lose to the agreement’s time bar. But despite repeated opportunities to support such allegation, Nexus has never offered any evidence—or even an allegation—of any amount at risk. Nexus has not even shown notice to ATT, as required under the agreement, to preserve any of its claims. The parties do not agree on those matters, and the statements of Nexus’ counsel are not evidence,<sup>27</sup> so the Commission has had no opportunity to rule on any evidence regarding any alleged hardship. In any event, any loss of claims is due to Nexus’s own failure to comply with 4 CSR 240-4.020(2).

Finally, as ATT notes, case law expressly provides examples of good cause. They include a good faith effort to do what a reasonable person does in the circumstances,<sup>28</sup> and a substantial reason on which an ordinary person neglects a legal duty.<sup>29</sup> But Nexus does not even allege such facts.

Therefore, Nexus has offered no good cause in support of waiving the regulation.

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<sup>26</sup> *Ladd v. Missouri Bd. of Probation and Parole*, 299 S.W.3d 33, 38 (Mo. App., W.D. 2009).

<sup>27</sup> *Estate of Bell*, 292 S.W.3d 920, 926-28 (Mo. App., W.D. 2009).

<sup>28</sup> *Central Mo. Paving Co., Inc. v. Labor & Indus. Relat. Comm’n*, 575 S.W.2d 889, 892 (Mo. App., K.C.D., 1978).

<sup>29</sup> *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912).

*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.

No literal enforcement of that provision is possible because filing has already occurred.

But Nexus offers no alternative to ATT's suggestion and so, essentially, asks the Commission to treat noncompliance the same as compliance. An abeyance starting with the complaint's filing date, to account for the 60-day notice period, might constitute a fitting remedy. But Nexus brushes that measure aside as moot, citing the passage of time since the filing of the complaint. More persuasive is Nexus's failure to show that any claims are in jeopardy. As Nexus rejects any remedy less than dismissal, so will the Commission.

On these facts, the Commission concludes, fairness requires a remedy. Nevertheless, the Commission notes that ATT does not ask for dismissal with prejudice. Therefore, the Commission will dismiss the complaint without prejudice to filing another complaint seeking enforcement of the interconnection agreement.

**THE COMMISSION ORDERS THAT:**

1. The *Motion to Dismiss of Southwestern Bell Telephone Company D/B/A AT&T Missouri* is granted.
2. The Commission dismisses the complaint for good cause and failure to comply with a Commission regulation.

3. The dismissal is without prejudice.
4. This order shall be effective February 5, 2011.
5. This file shall close February 6, 2011.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

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

Jordan, Senior Regulatory Law Judge