

**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 TO NEXUS' RESPONSE TO ORDER
TO SHOW CAUSE AND REQUEST FOR WAIVER**

COMES NOW AT&T Missouri,¹ and pursuant to the Commission's January 12 Order to File Reply, respectfully submits its reply to Nexus Communications, Inc.'s (Nexus') Response to Order to Show Cause and Request for a Waiver ("Response").² For the following reasons, the Commission should find that Nexus has not shown good cause to waive the Commission's "notice of intent" rule (4 CSR 240-4.020(2)) and it should dismiss Nexus' complaint.

1. 4 CSR 240-4.020(2) states:

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 [C]ommission.

2. On December 9, 2010, AT&T Missouri moved the Commission to dismiss Nexus' complaint based on this rule. Nexus' December 20 Response to AT&T Missouri's

¹ Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri").

² All arguments made here are directed equally to Nexus' January 10 Request for Waiver as well as Nexus' January 10 Response to the Commission's January 5 Order to Show Cause. Furthermore, Nexus' waiver request should be denied on the separate and independent ground that when Nexus filed its January 10 waiver request, it had already made an earlier waiver request. *See*, Nexus' December 20, 2010, Response to AT&T's Motion to Dismiss, at 3-4. AT&T Missouri responded to each of Nexus' arguments in support of its request (*see*, AT&T Missouri's December 30 Reply in Support of Its Motion to Dismiss) and in its January 5, 2011, Order to Show Cause, the Commission rejected them as well, concluding that "Nexus failed to comply with a Commission regulation, for which it has offered *no good cause*["] (emphasis added). Given that the Commission has already rejected one waiver request, fairness requires that Nexus not be allowed to make another. AT&T Missouri knows of no precedent for allowing such a second opportunity, nor does this case afford any special ground for permitting it here.

Motion to Dismiss made it clear, as AT&T Missouri noted on December 30, that “Nexus does not dispute that it failed to file with the Commission a notice of its intent to file a contested case, as is plainly required by Commission Rule 4.020(2).” AT&T Missouri’s Reply in Support of its Motion to Dismiss, at 1. In its January 5, 2011, Order to Show Cause, the Commission agreed, finding that “Nexus filed no such notice of intent though . . . the complaint was likely -- if not certain -- to be a contested case.” Order to Show Cause, at 5. The Commission thus concluded that AT&T Missouri “has shown that Nexus failed to comply with 4 CSR 240-4.020(2).” *Id.* Equally important for purposes of this reply, the Commission determined that “Nexus resists that conclusion on several theories but *none refutes or excuses Nexus’ failure to comply[.]*” *Id.*, at 5. (emphasis added).

3. AT&T Missouri’s December 30 Reply in Support of its Motion to Dismiss had squarely addressed Nexus’ “good cause” arguments, and the Commission’s January 5 Order to Show Cause carefully considered -- and rejected -- each of them. The Order stated:

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.

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. . . . 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 [AT&T]’s showing of failure to comply with 4 CSR 240-4.020. (*Id.*, at 6-7).

4. In sum, as the Commission concluded almost three weeks ago, “Nexus failed to comply with a Commission regulation, for which *it has offered no good cause.*” *Id.*, at 7. (emphasis added). Likewise, none of Nexus’ newly packaged arguments equates to good cause.

5. For purposes of Rule 4.020(2), the term “good cause” means “a substantial reason amounting in law to a legal excuse for failing to perform an act required by law” or “a substantial reason or cause which would cause or justify the ordinary person to neglect one of his legal duties.” *In the Matter of Rex Deffenderfer Enterprises, Inc. Request for a Increase in Annual Water System Operating Revenues, File No. WR-2011-0056, Order Regarding Waiver Request*, 2010 Mo. PSC LEXIS 878 at *2 (September 8, 2010) (further citations omitted). None of Nexus’ new arguments constitutes a sufficient reason for its *own* failure and neglect to “perform one of [its] legal duties,” and none is meritorious in any event.

6. Nexus first claims that a waiver of the rule is warranted for the reason that Nexus has not offended the “purpose and intent of the [r]ule” because Nexus “has not had any prohibited communications with the Commission.” Response, at 3. However, the rule’s clear and unambiguous language does not require a showing that a prohibited communication has occurred as a condition precedent to a regulated utility’s obligation to file its notice of intent. In any event, the parties’ relative views of the purpose of the rule have already been vetted (*see*, Nexus’ Response to AT&T’s Motion to Dismiss, at 2-3, AT&T Missouri’s Reply in Further Support of Motion to Dismiss, at 2-3), and the Commission has determined that compliance with the rule is nevertheless required, finding that “the Commission’s intent is to control [outside the record] communication through a notice of intent” and that “Nexus did not comply with that requirement.” Order to Show Cause, at 5.

7. Nor, as a matter of administrative law, is this case an appropriate proceeding in which to measure the worth of Nexus’ “purpose and intent” argument. If Nexus’ complaint about the rule is that its language does not advance its purpose and intent, this is an issue that should be addressed, if at all, in the course of rulemaking proceedings wherein all regulated utilities and other affected stakeholders can consider and provide comment on whether amending

the rule in any manner may be appropriate in light of experience acquired in administering it.³ On the other hand, the issue is wholly irrelevant in this, an adjudicatory case, in which the only germane issue is whether Nexus has, in the Commission's words, justified its "*own* failure to comply" with the rule. Order to Show Cause, at 7. (emphasis added).

8. Nexus next asserts that "AT&T has not been harmed" and "Nexus has not benefited" from Nexus' non-compliance with the rule. Response, at 5. Once again, however, whether these assertions are true misses the central point, which is that neither offers a legitimate reason for Nexus' own failure to have obeyed the rule. Moreover, the Commission has already rejected the notion that these assertions justify granting Nexus its waiver request. Finally, both assertions are decidedly untrue, both factually and legally.

9. In particular, Nexus states that dismissal of its complaint would cause Nexus to "los[e] lawful claims against AT&T." Response, at 4. This is no different in kind than the point Nexus made several weeks ago, that "[t]o enforce Commission Rule 4.020(2) upon Nexus would cause Nexus further harm by effectively barring its recovery from AT&T an additional two months' worth of promotional credits." *See*, Nexus Response to AT&T's Motion to Dismiss, at 3.

10. At that time, AT&T Missouri noted that "for purposes of applying the appropriate period of limitations, any future filing by Nexus of a new complaint (after Nexus' filing of a timely notice of intent to file a contested case) would not "relate back" to the date of its filing of its non-compliant initial complaint. *See*, AT&T Missouri's Reply in Support of Its Motion to Dismiss, at 4. But as AT&T Missouri then also emphasized, "that consequence has no bearing on whether Nexus has demonstrated good cause in its having failed to comply with the

³ The present rule constitutes an "agency statement of general applicability that implements, interprets, or prescribes law or policy." Section 536.010(4), RSMo. Accepting Nexus' "purpose and intent" argument as a basis for denying AT&T Missouri's motion to dismiss would so alter the rule from its express words so as to constitute an amendment, the procedures for which are prescribed by Commission Rule 2.180 (4 CSR 240-2.180).

Commission's rule in the first instance.” *Id.* The Commission agreed when, after expressly rejecting Nexus' argument, it also concluded that “[i]n any event, any loss of claims is due to Nexus' own failure to comply with 4 CSR 240-4.020(2).” Order to Show Cause, at 7 (emphasis added); *see also, id.* (“Nexus failed to comply with a Commission regulation, for which it has offered no good cause[.]”).

11. As both a factual and legal matter, it simply cannot be said that Nexus will not have unfairly benefitted or that AT&T Missouri will not have been materially harmed if the Commission declines to dismiss this case. All litigants against whom a complaint has been brought are legally entitled to assert the applicable period of limitations in defense of claims made in the complaint. The fact that a valid period of limitations defense may lead to loss of claims is a well-understood consequence (indeed, it helps achieve the greater goal of encouraging filing of claims sooner than later, when witnesses and physical evidence are less likely to become inaccessible). Denial of AT&T Missouri's motion to dismiss surely would provide Nexus an unfair benefit while adversely impacting AT&T Missouri's period of limitations defense.

12. Finally, Nexus suggests that enforcing the rule is inappropriate because “more than 60 days have passed since Nexus filed its complaint on November 5.” Response, at 5. Once again, Nexus confuses consequence with justification. When the Commission early last year adopted the rule, it put all practitioners on notice that timely filing of a notice of intent is a condition precedent to filing a complaint case. As provided for by law, the rule became effective 30 days after June 30, 2010, when the rule was published in the Code of State Regulations, and thus became binding upon all regulated utilities -- including Nexus -- by operation of law. *See*, Section 536.021.8, RSMo. The mere passage of time since Nexus failed to abide by it offers no excuse for its failure.

13. Regardless, Nexus was (and remains) fully capable of mitigating the consequences of its failure, but it has declined to do so. When AT&T Missouri filed its December 9 Motion to Dismiss, thereby putting Nexus on notice of its grounds for dismissal, nothing prevented Nexus from immediately thereafter filing a notice of intent so as limit the consequences or perhaps otherwise “hedge its bets” against a potentially unsatisfactory ruling. Nexus’ having declined to make that filing is what has exacerbated the consequences of its own initial failure, not the pendency of AT&T Missouri’s motion.

WHEREFORE, AT&T Missouri respectfully submits that the Commission should find that Nexus has not shown good cause to waive 4 CSR 240-4.020(2) and that it should dismiss Nexus’ complaint.

Respectfully submitted,

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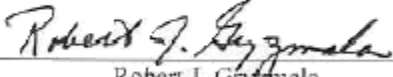
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to each of the below by e-mail on January 24, 2011.


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