BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Nexus Communications, Inc., )

)

Complainant, )

)

v. ) Case No. 10-2518-TP-CSS

)

AT&T Ohio, )

)

Respondent. )

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AT&T OHIO'S REPLY

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AT&T Ohio, by its attorneys and pursuant to Section 4901:1-12(B)(2) of the Commission's rules, replies to the memorandum contra its motion to dismiss the first amended complaint filed by Nexus Communications, Inc. on March 9, 2011.[[1]](#footnote-1)

As it did in its memorandum contra filed on December 14, 2010, Nexus again fails to distinguish the controlling precedent established by this Commission in the Revolution Communications case that holds that parties to a bilateral, Commission-approved interconnection agreement ("ICA") must invoke and exhaust the pertinent dispute resolution provisions of such an agreement before proceeding to litigation. Despite the passage of many months since its complaint was filed, Nexus has still not invoked or exhausted the dispute resolution provisions of the parties' ICA here. Nor did Nexus give proper notice of its dispute. Nexus again argues that it should not have to do so and claims that requiring it to follow the agreed-to dispute resolution provisions of its interconnection agreement would be "an exercise in futility." Memorandum Contra, pp. 2 and 3-6.

Following the dispute resolution provisions specified in the parties' interconnection agreement would not be a futile act. Not only is doing so legally required, it would have positive practical effects in this case. This is because Nexus' amended complaint, like its original one, is long on broad generalizations and short on specifics. Nexus challenges "each and every one" of AT&T Ohio's cash back promotions, going back to late 2003. But Nexus never alleges or explains that it ordered service that was subject to "each and every one" of those promotions, and if so, how many times. There is no quantification of Nexus' claims at all. Moreover, challenges going back that far may well be outside the interconnection agreement's time limitations on such disputes. Without more specifics, one can only guess at this point. This is why Nexus' complaint, even as amended, fails to properly state a claim. This is also why following the dispute resolution provisions, as set forth in the parties' interconnection agreement, would shed some much-needed light on the scope and the specifics of Nexus' claims.

The issue of Nexus' notification of the dispute to AT&T Ohio deserves special mention here. In responding to AT&T Ohio's first set of discovery on March 7, 2011, Nexus acknowledged that its disputes concerning the cash-back promotions were filed using AT&T's dispute web portal on December 10, 2010.[[2]](#footnote-2) That was over one month after Nexus filed its original complaint in this case. As more facts come to light, through discovery and otherwise, it is clear that pursuing dispute resolution in this case, as required by the ICA, would likely be productive, and not futile as Nexus claims.

Nexus attempts to justify its proposed "futility" exception to the clear language of the ICA. Id., pp. 3-6. But most pertinent to the issue presented here is this Commission's own decision in Revolution Communications, where the Commission found that the CLEC's requests for Commission action were premature and directed the parties to address the dispute in accordance with the dispute resolution provisions of their interconnection agreement. Revolution Communications, Ltd., Case No. 05-1180-TP-CSS, Entry, February 1, 2006. In that case, the Commission held as follows:

The Commission finds that Revolution's pending motion is premature. Although Revolution contends that injunctive relief is necessary due to AT&T Ohio's intent to cease processing new orders and terminate Revolution's service, the Commission notes that AT&T Ohio has stated that it has voluntarily withheld further collection action at this time. Therefore, Revolution's motion for an immediate order requiring AT&T Ohio to cease and desist from suspending Revolution's provisioning is currently premature. The parties are directed to address the current dispute in accordance with the dispute resolution provisions of the applicable interconnection agreement.

Id., pp. 4-5. It is noteworthy that the Commission recognized and enforced the interconnection agreement's dispute resolution provisions even in a case where order processing and the termination of service were at issue. It is clear that similar dispute resolution provisions should also be recognized and enforced in a dispute over the appropriate resale discount to be applied to promotional offerings, as is the case here.

In its third argument, Nexus essentially concedes the propriety of the dispute resolution process, but asks that it not extend more than 60 days. Id., p. 6. Given that Nexus has put the case on hold of its own volition, that approach makes sense here. The Commission should order that Nexus pursue the ICA's dispute resolution process, thus respecting the important precedent established in the Revolution Communications case. AT&T Ohio does not object to a 60-day time limitation on that process.

For all of the foregoing reasons, AT&T Ohio's motion to dismiss should be granted. Alternatively, Nexus should be ordered to invoke and exhaust the ICA's dispute resolution provisions for a time period not to exceed 60 days before this case proceeds any further.

Respectfully submitted,

AT&T Ohio

By: \_\_\_\_\_\_\_\_/s/ Jon F. Kelly\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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1. AT&T Ohio incorporates by reference, to the extent it is relevant, its previous reply filed on December 20, 2010. [↑](#footnote-ref-1)
2. Nexus' Responses to Respondent's First Set of Interrogatories and First Requests for Production of Documents, Response to Interrogatory No. 4, March 7, 2011. [↑](#footnote-ref-2)