

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Nexus Communications, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. 10-2518-TP-CSS
)	
AT&T Ohio,)	
)	
Respondent.)	

AT&T OHIO'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

AT&T Ohio, by its attorneys and pursuant to Section 4901:1-12 of the Commission's rules, moves to dismiss the Second Amended Complaint filed on April 29, 2011 for the reason that the Complainant has not exhausted the dispute resolution provisions of the parties' interconnection agreement. A memorandum in support of this motion is attached.

Respectfully submitted,

AT&T Ohio

By: /s/ Jon F. Kelly

Jon F. Kelly
AT&T Services, Inc.
150 E. Gay St., Room 4-A
Columbus, Ohio 43215

(614) 223-7928

Its Attorney

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
SECOND AMENDED COMPLAINT

The Complainant Has Not Invoked Or Exhausted The Dispute Resolution Provisions Of The Parties' Interconnection Agreement

The filing of the Second Amended Complaint has not resolved this issue, first raised in AT&T Ohio's motion to dismiss the original complaint and raised again in connection with the First Amended Complaint. The Second Amended Complaint must be dismissed because Nexus has failed to both invoke and to exhaust the mandatory dispute resolution provisions of the parties' interconnection agreement.

The parties' April 19, 2002 interconnection agreement was filed for Commission approval on April 29, 2002 in Case No. 02-994-TP-NAG and was approved by operation of law on July 30, 2002. The agreement has been amended several times in ways not relevant to this case. Section 10 of the General Terms and Conditions of that agreement governs dispute resolution. That section details a dispute resolution process that Nexus has neither invoked nor exhausted prior to the filing of its complaint.

Under those provisions, the dispute resolution procedure is the initial remedy:

Section 10.2, General Terms and Conditions

10.2 Alternative to Litigation

10.2.1 The Parties desire to resolve disputes arising out of this Agreement without litigation. *Accordingly, the Parties agree to use the following Dispute Resolution*

procedures with respect to any controversy or claim arising out of or relating to this Agreement or its breach.

(Emphasis added.) The agreement also specifies that neither party can pursue a claim without first giving notice to the other party:

Section 10.3, General Terms and Conditions

10.3.1 Dispute Resolution shall commence upon one Party's receipt of written notice of a controversy or claim arising out of or relating to this Agreement or its breach. ***No Party may pursue any claim unless such written notice has first been given to the other Party.***

* * *

(Emphasis added.) The agreement also contains an arbitration provision. Arbitration is mandatory for "[e]ach unresolved billing dispute involving one percent (1%) or less of the amounts charged to the Disputing Party under this Agreement in the state in which the dispute arises during the twelve (12) months immediately preceding receipt of the letter initiating Dispute Resolution under Section 10.3." Sec. 10.6.2.1. Arbitration is elective at mutual agreement of both parties for all other claims. Otherwise, "[i]f both Parties do not agree to arbitration, then either Party may proceed with any remedy available to it pursuant to law, equity or agency mechanism." Sec. 10.6.3.

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. Engaging in the mandatory dispute resolution process would bring additional clarity to the facts and legal issues that this case raises. While Nexus has clarified many of its allegations, when compared to the original or the First Amended Complaint, issues remain to be identified and resolved. For example, Nexus alleges, without

support, that it "met the same qualifications as AT&T's retail end users and applied for these promotional credits." Second Amended Complaint, p. 5, ¶ 9. To the contrary, AT&T Ohio believes that a significant number of Nexus customers did not meet the required qualifications. This is 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 interconnection agreement contemplates this as an important first step before formal litigation, here or elsewhere.

Pertinent to the issue presented here is the Commission's 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.

Also pertinent to the issue presented here is the recent action of the Public Utility Commission of Texas in connection with the similar complaint filed with that agency by Nexus. In its order issued on January 21, 2011 that Commission "abated" that case to allow the parties to engage in informal dispute resolution, as required by their ICA, which had not yet occurred. See Attachment.

The dispute resolution provisions of the parties' interconnection agreement are an important part of that agreement. Nexus cannot ignore them. Its attempt to blow them off in a situation where it believes following them would be "essentially futile" should not be rewarded. It bears repeating that the parties, through their interconnection agreement, agreed as follows:

10.2.1 The Parties desire to resolve disputes arising out of this Agreement without litigation. ***Accordingly, the Parties agree to use the following Dispute Resolution procedures with respect to any controversy or claim arising out of or relating to this Agreement or its breach.***

For the words "any controversy or claim" to have any meaning, they must extend to the controversy and claim that is the subject of this complaint. The Commission should enforce the substantial rights that AT&T Ohio has under that provision.

The interconnection agreement also recognizes that, while some types of claims are not subject to arbitration under the agreement's arbitration clause, they are still subject to the other aspects of the agreed-to dispute resolution process. For example, in Section 10.6.4.3 of the

agreement, all claims arising under federal or state statutes, while not subject to arbitration, are otherwise subject to the agreement's dispute resolution provisions.

Consistent with the parties' interconnection agreement and with the Commission's precedent in the Revolution Communications case, all of the claims made by Nexus are required to be pursued through the dispute resolution provisions of the interconnection agreement.

Because Nexus has neither invoked nor exhausted the applicable dispute resolution provisions and because it failed to give AT&T Ohio notice of the claim, as required under the parties' agreement, its Second Amended Complaint must be dismissed.

Respectfully submitted,

AT&T Ohio

By: /s/ Jon F. Kelly

Jon F. Kelly
AT&T Services, Inc.
150 E. Gay St., Room 4-A
Columbus, Ohio 43215

(614) 223-7928

Its Attorney

Certificate of Service

I hereby certify that a copy of the foregoing has been served by e-mail this 4th day of August, 2011 on the following parties:

Nexus Communications, Inc.

Christopher Malish
Malish & Cowan, P.L.L.C.
1403 West Sixth Street
Austin, TX 78703

cmalish@malishcowan.com

Thomas J. O'Brien
Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291

tobrien@bricker.com
mwarnock@bricker.com

/s/ Jon F. Kelly
Jon F. Kelly

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/4/2011 8:41:35 AM

in

Case No(s). 10-2518-TP-CSS

Summary: Motion to dismiss second amended complaint and memorandum in support electronically filed by Jon F Kelly on behalf of AT&T Ohio