BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Nexus Communications, Inc. Complainant, v. Ohio Bell Telephone Company d/b/a AT&T Ohio, Respondent.	)	Case No. 10-2518-TP-CSS

NEXUS COMMUNICATIONS, INC.' MEMORANDUM CONTRA AT&T OHIO'S MOTION TO DISMISS NEXUS' SECOND AMENDED COMPLAINT

Nexus Communications, Inc. ("Nexus"), pursuant to Ohio Administrative Code Rule 4901-1-12, hereby responds to Ohio Bell Telephone Company d/b/a AT&T Ohio's ("AT&T Ohio") Memorandum in Support of its Motion to Dismiss First Amended Complaint ("Motion to Dismiss"). For the reasons set forth below, the Public Utilities Commission of Ohio ("Commission") should deny AT&T Ohio's Motion to Dismiss.

I. INTRODUCTION

AT&T Ohio re-asserts a single reason supporting its Motion to Dismiss: the allegation that Nexus "has not invoked or exhausted the dispute resolution provisions of the parties' interconnection agreement."[1] In fact, however:

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[1] The Interconnection Agreement entered into between AT&T Ohio and Nexus was approved by operation of law on July 30, 2002 in PUCO Case No. 02-0994-TP-NAG (the "ICA") More specifically, AT&T Ohio refers to Sections 10.2 and 10.3 of the ICA, which state:

- Section 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

1) the parties engaged in informal alternative dispute resolution;

2) given the particular facts of this case, where engaging in further alternative dispute resolution would be an exercise in futility, further enforcement of the dispute resolution provisions of the ICA are unenforceable conditions precedent; and

3) even if the alternative dispute resolution provisions in the ICA were enforceable under the facts of this case, dismissal is a premature remedy.

Accordingly, AT&T Ohio's Motion should be denied.

II. ANALYSIS

A. Nexus engaged in informal dispute resolution.

In addition to conferences on this issue at a high level between representatives of Nexus and AT&T, on December 10, 2010, Nexus filed formal disputes with AT&T via AT&T's web portal for processing disputes as called for by the contract. Nexus' disputed the appropriate amount it should have been credited in situations where AT&T had approved the award of a promotional credit for orders qualifying for certain cash back promotions. Again, please note these are for orders in which AT&T has ***already approved*** each and every one of the promotional credit requests; the only dispute was over the amount due qualifying reseller orders under the promotions at issue. In using AT&T's system to dispute the amount of the promotional credits for orders previously deemed eligible for the promotions, Nexus provided all the information

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

Section 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 of its breach. No party may pursue any claim unless such written notice has first been given to the other Party. There are three (3) separate Dispute Resolution methods: Service Center . . . Informal Dispute Resolution; and Formal Dispute Resolution

AT&T's system required for the identification of each and every promotional credit request, such as:

- Record type;
- Claim type;
- Account identification;
- Billing date;
- Customer claim number;
- Amount requested;
- Customer comments (which are limited by AT&T's system to 256 characters, including space); and
- Circuit identification/actual telephone number to which the promotion credit applies.

However, because AT&T's position on this dispute as to the proper credit due resellers entitled to cash back promotions was thoroughly developed, well known, and unwavering (as shown by the fact that AT&T was litigating this issue in a number of states), rather than engage in the farce of attempting to persuade AT&T to change its entrenched position on this issue, Nexus filed its complaints in this case. As Paragraph 4 of the First Amended Complaint notes, Nexus:

> has made an attempt at informal dispute resolution by teleconference with between counsel for Nexus and AT&T at a high level. However, further negotiation at this stage is essentially futile, because AT&T cannot compromise its position with Nexus without adversely affecting its litigation stance in approximately 12 substantively identical pending cases that AT&T has been pursuing with a number of CLECs for many months.[2]

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[2] *See e.g., BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi Teleconnect, LLC*, Docket No. 31323 before the Alabama Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. dPi Teleconnect, LLC*, Consolidated Docket No. U-31364 before the Louisiana Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina v. dPi Teleconnect, LLC*, Docket No. P-863, Sub 5 before the North Carolina Utilities Commission; and *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC*, Docket No. 2010-18-C before the Public Service Commission of South Carolina.

> Counsel for Nexus represents other CLECs in these cases, some of which are in jurisdictions which require an attempt at informal resolution prior to bringing a formal complaint. These cases exist precisely because AT&T and CLECs cannot agree on the resolution of the polarizing issue only now being brought in Ohio—namely, the credits that are due from AT&T to Nexus as a result of Nexus reselling AT&T telecommunications services subject to **all** AT&T "cash back" promotions offered at retail.

This statement, and Nexus' actions, sufficiently satisfy the alternative dispute resolution provisions in the ICA.

B. Invocation and exhaustion of the dispute resolution provisions of the ICA are not enforceable conditions precedent because strict adherence to such provisions is an exercise in futility.

Given the peculiar stance of this case, whether Nexus adequately complied with the letter of the contract is irrelevant, because no amount of informal dispute resolution proceedings would change the fundamentals of this particular case or the positions of the parties. In other words, we know informal dispute resolution proceedings would be an act of futility. The failure to more vigorously pursue IDR is only a defense when IDR would provide a remedy that could afford Nexus the relief it seeks. *See, e.g., Kaufman v. Newburgh Heights* (1971), 26 Ohio St.2d 217 , 219 (explaining "[i]t is axiomatic that the doctrine of 'failure to exhaust administrative remedies available' may be a defense to an action in mandamus; to an action for a declaratory judgment; or to an action for damages only if interposed, and if a remedy exists"). (Citations omitted).

In this case, and as explained in the First Amended Complaint, "further negotiation at this stage is essentially futile, because AT&T cannot compromise its position with Nexus without adversely affecting its litigation stance in approximately 12 substantively identical pending cases that AT&T has been pursuing with a number of CLECs for many months." Furthermore,

negotiations around the country between AT&T and other CLECs[3] on the same key issue involved in this case – how to calculate the wholesale price of a service subject to a cash back promotion – have already failed, leading ***AT&T*** to commence litigation against those CLECs. In fact, counsel for Nexus has represented other competitive local exchange carriers ("CLECs") with positions identical to Nexus' position in this case in at least eight jurisdictions.[4] Consequently, counsel for Nexus has firsthand knowledge of AT&T's position on the underlying issues and the futility of attempting informal dispute resolution, notwithstanding the informal dispute resolution provisions included in the respective ICAs.

Throughout these other jurisdictions, AT&T has been firm on its refusal to offer the full value of its cash back promotions to CLECs since at least 2006.[5] In fact, AT&T has repeatedly admitted on the record that AT&T's position and the CLEC position (which Nexus also espouses) on how to calculate the wholesale price for services subject to a cash back promotion are fundamentally irreconcilable, thereby necessitating commission intervention. For example,

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[4] *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi Teleconnect, LLC*, Docket No. 31323 before the Alabama Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al.*, Consolidated Docket No. U-31364 before the Louisiana Public Service Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina v. dPi Teleconnect, LLC*, Docket No. P-863, Sub 5 before the North Carolina Utilities Commission; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC*, Docket No. 2010-18-C before the Public Service Commission of South Carolina; *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Florida*, Docket No. 090258-TP before the Florida Public Service Commission; *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Georgia*, Docket Nos. 21849 and 29374 before the Georgia Public Service Commission; *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Docket No. 2009-00127 before the Kentucky Public Service Commission; *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana*, Docket No. U-30976 before the Louisiana Public Service Commission; *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Cause No. 5:10-CV-00466-BO before the Eastern District Court of North Carolina; and *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina*, Docket No. 2008-160-C before the Public Service Commission of South Carolina.

[5] *See In the Matter of: Petition of Image Access, Inc. d/b/a New Phone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules*; WC Docket No. 06-129 before the Federal

at a hearing before the Public Service Commission of South Carolina, counsel for AT&T affirmatively stated:

> Right now the resellers are folding their arms and saying, "We are right on the law." Frankly, we're folding our arms and saying, "We are right on the law." And there's no negotiation on the past-due billing because of that, and we need your guidance to break that logjam.[6]

In such situations, it is black-letter law that performance of a condition precedent otherwise required by contract is excused where such performance would be a futile act.[7] The rule in Ohio is no different: "[T]his court will not require an act that is vain, futile, or useless...." *Groppe v. Cincinnati*, 2005 WL 3240040, ¶ 6 (Ohio App. 1 Dist.); *Livi Steel, Inc. v. Bank One, Youngstown, N.A.*, 584 N.E.2d 1267, 1270 (Ohio App. 11 Dist. 1989) ("[N]o one should be required to perform a futile act."); *Tangeman v. Tangeman*, 2000 WL 217284, *2 (Ohio App. 2 Dist.) ("A party is not required to perform a vain and futile act."). This concept is also embodied in Ohio case law on administrative remedies: s*ee State ex rel. Cotterman v. St.*

Communications Commission.

[6] *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC*, Consolidated Docket Nos. 2010-14-C ~19-C before the Public Service Commission of South Carolina, Hearing #10-11166, p. 24, lines 4-11, (P.S.C.S.C. December 16, 2010) (from opening statements by AT&T attorney, Mr. Patrick Turner).

See also BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Alabama v. dPi Teleconnect, LLC, Docket No. 31323 before the Alabama Public Service Commission, (Hearing transcript, p. 44, lines 11-16, (A.P.S.C. January 21, 2011) (from opening statements by AT&T attorney, Mr. Patrick Turner):

> [W]e've got a log jam that's building every day. We need to break it. We need to end this vicious cycle on going forward basis so we know the rules going forward. . . .;

and

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al., Consolidated Docket No. U-31364 before the Louisiana Public Service Commission, Hearing transcript, p. 14, lines 3-7, (L.P.S.C. November 4, 2010) (from opening statements by AT&T attorney, Mr. Patrick Turner)

> Once we understand what the ground rules are, there's probably some opening for some good negotiations. But today, both sides are saying, "I'm right on the Law." And no one's moving off the (INAUDIBLE). So we need that ruling. We also need it to end this vicious cycle of continuing disputes. . . .

[7] Samuel Williston, Williston on Contracts § 47:4 (4th ed.).

Mary's Foundry (1989), 46 Ohio St.3d 42, 44 ("a person need not pursue administrative remedies if such an act would be futile."); *Karches v. Cincinnati* (1898), 38 Ohio St.3d 12, 16 ("if there is no administrative remedy available which can provide the relief sought, *Kaufman, supra,* or if resort to administrative remedies would be wholly futile, exhaustion is not required").

The North Carolina Utilities Commission has said much the same thing about enforcing IDR provisions under circumstances like those we have here:

> We believe that the purpose of the escalation provision was to permit the parties, in good faith, to attempt to resolve disputes prior to resorting to a forum such as this Commission. To be effective, each party has to be open to a negotiated resolution of a disputed issue. Here, because of the unyielding position taken by [AT&T], there could be no negotiated resolution. [AT&T's] position was that these cashback promotions were not available for resale. No matter how many times dPi asked [AT&T], the answer would always be the same: denial, because "AT&T did not offer cashback promotions for resale." (Tr. P. 165) Thus, any action taken by dPi to comply with the escalation process would have been futile. dPi's nonperformance in this regard is therefore deemed to have been excused.[8]

Because AT&T Ohio cannot compromise AT&T's overall position with Nexus without adversely affecting AT&T's litigation stance in the many other pending cases, informal dispute resolution in this case is doomed. Given the certainty that AT&T Ohio cannot concede ground on AT&T's position with Nexus without jeopardizing its litigation stance in other pending cases, this Commission should conclude that enforcement of the dispute resolution provisions is futile, and deny AT&T Ohio's Motion to Dismiss.

C. Dismissal of the instant matter prior to a hearing on the merits is a premature and improper remedy.

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[8] Recommended Order, *In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent*, 2010 WL 1922679, *1922679 (N.C.U.C. May 07, 2010) (No. P-55, SUB 1744).

Should the Commission find enforcement of the dispute resolution provisions in the parties' ICA desirable, notwithstanding its near certain failure, then the proper remedy would be to stay this proceeding for up to 60 days to allow such discussions to run their course, rather than dismiss the case out of hand. Dismissing the case prematurely would simply cause the parties and the Commission to have to repeat the not inconsiderable work that already has been put into this case. In fact, in Nexus' case against AT&T Texas, Nexus agreed to such an approach at the strong urging of the Commission-appointed arbitrators who did not have the benefit of the briefing already presented to this Commission.[9] AT&T agreed not to challenge the abatement motion. However, it should be noted that, as expected, no substantive progress was made on the issues in the months over which the Texas case was abated, and that abatement served mainly to allow further "churning of the file." It is also worth noting that in the more than 8 months this case has been docketed, there has been no indication from AT&T that it is willing to compromise its position on refusing to extend resellers the full amount of cash back promotions, nor any attempt to even discuss the matter.

WHEREFORE, based upon the foregoing, Nexus respectfully requests that the Public Utilities Commission of Ohio deny AT&T Ohio's Motion to Dismiss.

Respectfully submitted,
NEXUS COMMUNICATIONS, INC.

/s/ Chris Malish
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[9] Order No. 2 Memorializing Prehearing Conference and Abating Proceedings, *Petition of Nexus Communications, Inc. for post-interconnection dispute resolution with Southwestern Bell Telephone dba AT&T Texas under FTA relating to recovery of promotional credit due*, Docket No. 39028 before the Public Utility Commission of Texas, issued January 21, 2011, attached as Exhibit A.

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CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of the foregoing was served either by hand delivery or electronic mail, as well as by regular U.S. Mail, this August 19, 2011.

/s/ Chris Malish
Christopher Malish

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Summary: Response Nexus Communications, Inc.'s Memorandum Contra AT&T Ohio's Motion to Dismiss Nexus' Second Amended Complaint electronically filed by Mr. Christopher Malish on behalf of Nexus Comunications, Inc.