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March 21, 2012

**VIA OVERNIGHT MAIL**

Mr. Jeff Derouen  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
P. O. Box 615  
Frankfort, KY 40602

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MAR 22 2012

PUBLIC SERVICE  
COMMISSION

Re: Nexus Communications, Inc., Complainant v. BellSouth  
Telecommunications, Inc., d/b/a AT&T Kentucky, Defendant  
PSC 2010-00444

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of AT&T Kentucky's Motion to Dismiss.

Please let me know if you have any questions.

Sincerely,

Mary K. Keyer

Enclosures

cc: Parties of Record

1027751

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:	)	
	)	
NEXUS COMMUNICATIONS, INC.	)	
	)	
COMPLAINANT	)	CASE NO.
	)	2010-00444
v.	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
D/B/A AT&T KENTUCKY	)	
	)	
DEFENDANT	)	

**AT&T KENTUCKY'S MOTION TO DISMISS**

BellSouth Telecommunications, LLC (f/k/a BellSouth Telecommunications, Inc.) d/b/a AT&T Kentucky ("AT&T Kentucky") respectfully submits this Motion to Dismiss Nexus's Amended Complaint because, even assuming all of the factual allegations in the Amended Complaint are true (which AT&T Kentucky does not concede), the Commission already has rejected Nexus' core legal position that it is entitled to the full retail amount of any "cashback" benefit for which it qualifies.<sup>1</sup> Because Nexus is not entitled to any of the relief it seeks as a matter of law, the Commission should dismiss its Amended Complaint.

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<sup>1</sup> See Order, *In re: dPi Teleconnect LLC v. AT&T Kentucky*, Case No. 2009-00127 at 13 (entered January 19, 2012) ("The Commission finds that any [cashback] promotional discounts should be adjusted by the wholesale discount."); Order, *In re: dPi Teleconnect LLC v. AT&T Kentucky*, Case No. 2009-00127 at 3 (entered March 2, 2012) (denying reconsideration and noting that the "reasoning and conclusion" of the February 19, 2012 Order of the federal district court in North Carolina "underscores the Commission's confidence that it reached the correct decision in its January 19, 2012 Order.").

## ARGUMENT

In considering this Motion to Dismiss, the Commission must consider only the factual allegations set forth in Nexus' Amended Complaint and presume that they are true as pled. See, e.g., *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. Ct. App. 2009). The Commission must then determine whether Nexus is entitled to the relief it seeks as a matter of law. *Id.* As explained below, it is not.

Nexus alleges that “this Amended Complaint arises out of AT&T’s refusal to pay Nexus the full value of any and all ‘cash back’ promotional credits on telecommunication services for which Nexus has qualified and applied,”<sup>2</sup> and it alleges that each promotion at issue is a “cashback” promotion.<sup>3</sup> Nexus further alleges that AT&T Kentucky “provided Nexus with a reduced amount” of the cashback credits Nexus requested because AT&T Kentucky “discounted the cash back promotion by the wholesale discount percentage,”<sup>4</sup> and it alleges that “[t]he only issue needing to be addressed by the Commission is the fact that AT&T has extended Nexus only a fraction of the promotional credit due for each request Nexus filed, rather than the full face value of the promotion as it should under federal and state law.”<sup>5</sup>

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<sup>2</sup> See Amended Complaint at 1.

<sup>3</sup> *Id.* at 4, Table 1.

<sup>4</sup> *Id.* at 4, n.2. In Kentucky, the wholesale discount percentage is 16.79%. See Order, *In the Matter of: The Interconnection Negotiations between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C.*, before the Kentucky Public Service Commission, Case No. 96-482 (Feb. 6, 1997), at 11.

<sup>5</sup> See Amended Complaint at 3-4, ¶ 8 (emphasis added). See also Amended Complaint at 4, n.3 (alleging that Nexus “seeks the difference between the full face value of the

The Commission has already considered this very issue in Case No. 2009-00127 (the *dPi v. AT&T Kentucky* complaint case), and it determined that “any [cashback] promotional discounts should be adjusted by the wholesale discount.”<sup>6</sup> The Commission’s ruling in Case No. 2009-00127 applies with equal force to Nexus’ Amended Complaint – in fact, the legal argument Nexus presents at pages 6 through 14 of the Amended Complaint is substantively identical to the legal argument dPi presented in its briefs, oral argument, and motion for reconsideration in Case No. 2009-00127 (which is not surprising, given that the same counsel that represented dPi also represents Nexus). There simply is no reason for the Commission to expend time and resources considering yet again the same arguments it considered – and squarely rejected – less than a month ago in its Order denying dPi’s motion for reconsideration.<sup>7</sup>

### **CONCLUSION**

For the reasons set forth above, AT&T Kentucky respectfully requests that the Commission dismiss Nexus’ Amended Complaint with prejudice.

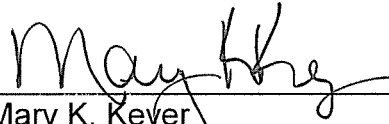
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[cashback] promotions, as AT&T should have provided (and what AT&T gives its own retail customers), and what AT&T improperly discounted and underpaid Nexus.”)

<sup>6</sup> See Order, *In re: dPi Teleconnect LLC v. AT&T Kentucky*, Case No. 2009-00127 at 13 (entered January 19, 2012).

<sup>7</sup> See Order, *In re: dPi Teleconnect LLC v. AT&T Kentucky*, Case No. 2009-00127 (entered March 2, 2012).

Respectfully submitted,



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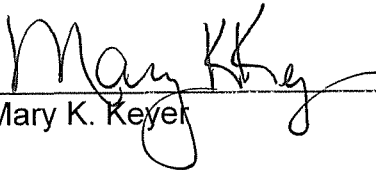
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CERTIFICATE OF SERVICE – PSC 2010-00444

I hereby certify that a copy of the foregoing was served on the following individual by mailing a copy thereof via U.S. Mail, this 21st day of March 2012.

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