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Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, Ohio 43215-3793

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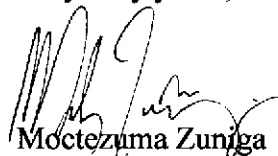
*Re: Nexus Communications, Inc. v. Ohio Bell Telephone Company d/b/a AT&T Ohio;
Case No. 10-2518-TP-CSS*

Dear Docketing Division:

Regarding the above-referenced case, enclosed please the original and twelve (12) copies of Nexus Communications, Inc.'s Response to AT&T Ohio's Reply to Nexus' Memorandum Contra AT&T's Motion to Dismiss Nexus' Second Amended Complaint which was filed electronically today, August 29, 2011, with the Public Utilities Commission of Ohio.

Thank you for your attention to this matter. Should you have any questions, please feel free to contact the office.

Very truly yours,


Moctezuma Zuniga

Enclosures

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Nexus Communications, Inc.

Complainant,

v.

Ohio Bell Telephone Company d/b/a
AT&T Ohio,

Respondent.

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Case No. 10-2518-TP-CSS

**NEXUS COMMUNICATIONS, INC.’ RESPONSE TO AT&T OHIO’S REPLY TO
NEXUS’ MEMORANDUM CONTRA AT&T’S MOTION TO DISMISS NEXUS’
SECOND AMENDED COMPLAINT**

AT&T Ohio continues to insist that Nexus’s be required “exhaust the dispute resolution provisions of the parties’ interconnection agreement.” AT&T argues that such provisions should be followed even if they are futile, and suggests that this Commission has required such meaningless expenditures of resources in the past, pointing repeatedly to *Revolution Communications, Ltd*, Case No. 05-1180-TP-CSS, Entry, February 1, 2006. But the *Revolution* case cited provides absolutely no guidance for the case before us, because it deals with a diametrically different fact pattern.

First, unlike our case, Case No. 05-1180-TP-CSS involved a discrete issue between Revolution and AT&T in Ohio that had not previously been the subject of litigation anywhere. Second, in Case No. 05-1180-TP-CSS, Revolution skipped the dispute resolution process because it was seeking emergency injunctive relief from the Commission to prevent the interruption of its provisioning. Third, after the case was filed, AT&T voluntarily agreed to cease the collection activity that Revolution was seeking to enjoin in the first instance – thereby

removing the possibility of the imminent harm that would otherwise have required injunctive relief. These three things together give rise to a colorable argument that the issue between the parties had not been fully explored and developed prior to bringing it to the Commission.

In stark contrast, the present case involves a single issue (whether resellers are entitled to the entire amount of cash back promotions that AT&T makes available at retail) that has had AT&T and resellers diametrically opposed for years prior to the filing of Nexus' complaint. In fact, *AT&T* has initiated suits against other resellers that turn on this very issue precisely because each side's position has been fully developed and the parties' positions are fundamentally irreconcilable. This is fully borne out by the fact that AT&T is already litigating this issue in more than 15 states with more than half a dozen resellers, as detailed in Nexus' memorandum contra. Given the peculiar stance of this case, no amount of informal dispute resolution will change the fundamental positions of the parties. By asking the Commission to require further "dispute resolution" under the circumstances, AT&T is asking the Commission to take a position at odds with the jurisprudence of the rest of Ohio and the world beyond. *See Groppe v. Cincinnati*, 2005 WL 3240040, ¶ 6 (Ohio App. 1 Dist.): "[T]his court will not require an act that is vain, futile, or useless...."; *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.)

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
Christopher Malish (Texas Bar No. 00791164)
Admitted *pro hac vice* in Ohio

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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 29, 2011.

/s/ Chris Malish
Christopher Malish

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