

**BEFORE THE  
MISSOURI PUBLIC SERVICE COMMISSION**

<b>NEXUS COMMUNICATIONS, INC.</b>	)	
	)	
<b>v.</b>	)	<b>CASE NO. TC-2011-0132</b>
	)	
<b>SOUTHWESTERN BELL TELEPHONE</b>	)	
<b>COMPANY D/B/A AT&amp;T MISSOURI</b>	)	

**NEXUS COMMUNICATIONS, INC.’S RESPONSE TO  
ORDER TO SHOW CAUSE AND REQUEST FOR WAIVER**

Nexus Communications, Inc. (“Nexus”) hereby responds to the Missouri Public Service Commission's (“Commission”) *Order to Show Cause* (“Order”) and requests waiver of compliance with Commission Rule 4.020 (“4 CSR 240-4.020” or the “Rule”) *Ex Parte and Extra-Record Communications* because compliance with the Rule does not serve its underlying purpose – to prevent *ex parte* communications with Commission.

**I. INTRODUCTION**

1. Nexus filed its *Original Complaint* (“Complaint”) against Southwestern Bell Telephone Company d/b/a AT&T Missouri (“AT&T”) with the Commission on November 5, 2010. AT&T filed its *Answer and Affirmative Defenses* (“Answer”) and its *Motion to Dismiss* (“Motion”) on December 9, 2010. Nexus filed its *Response to AT&T’s Motion to Dismiss* on December 20, 2010. AT&T then filed its *Reply in Support of Its Motion to Dismiss* (“Reply”) on December 30, 2010.
2. The Commission issued its Order to Nexus on January 5, 2011, whereby it ordered “[n]ot later than January 10, 2011, Nexus shall file a response to this order showing good cause to waive the notice of intent requirement of 4 CSR 240-4.020.”

3. Good cause exists for excusing compliance with the notice requirement in 4 CSR 240-4.020(2) because: the published purpose of the Rule is to prevent *ex parte* communications; Nexus did not violate the purpose, intent, or spirit of the Rule, as *ex parte* communications have not occurred in this case; AT&T will not be harmed or disadvantaged by Nexus' non-compliance with the Rule; Nexus will not unfairly benefit from its non-compliance with the Rule; strict enforcement of the Rule results in additional harm to Nexus; as of the date of this filing, the Commission has had more than 60 days' notice of Nexus' complaint against AT&T, thus satisfying, in spirit, the purpose and intent of the Rule; and Nexus did not hide the fact that its complaint constituted a contested case. Accordingly, Nexus' request to waive compliance with 4 CSR 240-4.020 in the instant matter should be granted.

**II. PURPOSE AND INTENT OF COMMISSION RULE 4.020 (4 CSR 240-4.020)**  
**EX PARTE AND EXTRA-RECORD COMMUNICATIONS**

**A. Language, Published Purpose, Commission's Purported Intent, and Classification of the Rule.**

4. 4 CSR 240-4.020 is found in Chapter 4 of the Commission's rules. Chapter 4 relates to the standards of conduct *of the Commission*, and generally sets out prohibitions against ex-parte communications and the acceptance of gifts or gratuities by the Commission or its staff. The published purpose of 4 CSR 240-4.020<sup>1</sup> is:

To set forth the standards to promote the public trust in the commission

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<sup>1</sup> In relevant part, the language of 4 CSR 240-4.020 provides,

- (2) Any regulated entity that intends to file a case likely to be a contested case shall file a notice with the secretary of the commission a minimum of sixty (60) days prior to filing such case. Such notice shall detail the type of case and issues likely to be before the commission.
- (A) Any case filed which is not in compliance with this section shall not be permitted and the secretary of the commission shall reject any such filing.
- (B) A party may request a waiver of this section for good cause.

with regard to pending filings and cases. This rule regulates *communication between the commission, technical advisory staff, and presiding officers, and anticipated parties, parties, agents of parties, and interested persons* regarding substantive issues that are not part of the evidentiary record.<sup>2</sup> (emphasis added).

In fact, the Commission stated in its Order that its “intent” regarding 4 CSR 240-4.020 “is to control [communication outside the record] through a notice of intent, stating that a complaint is imminent.”<sup>3</sup> The Commission added that “[prohibited communications] are the ills against which 4 CSR 240-4.020 provides protection.”<sup>4</sup> In other words, this Rule protects against *ex parte* and extra-record communications.

### **III. REQUEST FOR WAIVER**

#### **A. Enforcement of 4 CSR 240-4.020(2)(A) Should Be Waived Because It Serves No Purpose in the Instant Matter.**

5. 4 CSR 240-4.020(2)(A) provides that “[a]ny case filed which is not in compliance with this section shall not be permitted and the secretary of the commission shall reject any such filing.” However, subsection (B) indicates that “a party may request a waiver of this section for good cause.”<sup>5</sup>

6. Good cause exists to waive the Rule in the instant matter because it serves no purpose under the present circumstances: Nexus has had no *ex parte* communication or any communication with the Commission on the subject at issue for 60 days preceding the filing of its Complaint. Nexus has not had any prohibited communications with the Commission, protection from which are the purpose and intent of the Rule. As such, Nexus has complied with the spirit of the Rule. In light of Nexus’ compliance with the

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<sup>2</sup> 4 CSR 240-4.020 *Ex Parte and Extra-Record Communications*. Rescinded and readopted: Filed November 4, 2009, effective July 30, 2010.

<sup>3</sup> See Order to Show Cause issued by the Missouri Public Service Commission on January 5, 2011, at 5.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> A request for waiver that is made subsequent to the filing of the pleading instituting the contested case is not forbidden by the rule.

purpose and intent of the Rule, strict enforcement of the Rule, as suggested by AT&T, would be punitive and amount to a delay of justice.

7. As mentioned in its response to AT&T's Motion, Nexus filed its complaint in consideration of the 24-month statute of limitations which would limit its claims for promotional credits due from AT&T. Without the waiver, the Rule would inflict on Nexus the unintended consequence of losing lawful claims against AT&T, far outside its stated purposes. To enforce the Rule at AT&T's insistence would impede Nexus' access to the Commission for redress, unfairly render stale Nexus' lawful claims against AT&T and offend public policy, if not fundamental fairness.

8. Additionally, the Rule allows "non-regulated" entities or individuals to file complaints without 60 days advance notice, ostensibly because the Commission does not consider the likelihood of *ex parte* communications with non-regulated entities or individuals as great as it may be with regulated public utilities. Where, as here, there has been no *ex parte* communication with the Commission by the "regulated entity complainant," Nexus submits that it should be allowed the same procedural privilege, which Commission approval of the waiver requested herein would effect.

9. Because preventing or delaying Nexus from pursuing its contested case (which has already been on file with the Commission for more than 60 days) does not serve the Rule's underlying purpose of preventing *ex parte* communications, good cause exists to grant Nexus' request that strict enforcement of the Rule be waived in the instant matter. Therefore, Nexus requests that the Commission grant Nexus' request and waive compliance with the notice of intent requirement of 4 CSR 240-4.020.

**B. AT&T Was Not Harmed and Nexus Has Not Benefited from Non-Compliance with the Rule.**

10. Again, the purpose and intent of 4 CSR 240-4.020 is to protect against *ex parte* or extra-record communications.

11. In its Answer and Motion, AT&T has not alleged it suffered any undue or additional harm from Nexus' strict non-compliance with the Rule. Furthermore, AT&T has not alleged Nexus unfairly benefited from strict non-compliance with the Rule.

12. Because AT&T has not been harmed and because Nexus has not benefited from non-compliance with the Rule, good cause exists to grant Nexus' request that strict enforcement of the Rule be waived in the instant matter. Therefore, Nexus requests that the Commission grant Nexus' request and waive compliance with the notice of intent requirement of 4 CSR 240-4.020.

**C. More Than 60 Days Have Already Passed Since Nexus Filed Its Complaint with the Commission.**

13. As thoroughly explained, the purpose and intent of 4 CSR 240-4.020 is to protect against *ex parte* or extra-record communications.

14. AT&T complains in its Answer, Motion, and Reply that the Rule's 60-day time period between a party's notice of intent and its filing of a complaint has been violated and that the Rule must be strictly enforced resulting in dismissal of Nexus' Complaint. Here, more than 60 days have passed since Nexus filed its Complaint on November 5, 2010. Thus, strict enforcement of the Rule would not put AT&T in any different position than they currently find themselves. Therefore, strict enforcement of 4 CSR 240-4.020 would serve no purpose in the instant matter. In any event, the proper remedy for a party's failure to endure a prescribed time period before filing a complaint should be an abatement of the proceedings until the time period has expired – not unilateral dismissal. However, because the Commission has had more than 60 days' notice of Nexus'

Complaint, an abatement of the proceedings for an additional time period would also serve no purpose.

15. Because prevention or further delay in Nexus' pursuit of its contested case (which has already been on file with the Commission for more than 60 days) does not serve the Rule's underlying purpose of preventing *ex parte* communications, good cause exists to grant Nexus' request that strict enforcement of the Rule be waived in the instant matter. Therefore, Nexus requests that the Commission grant Nexus' request and waive compliance with the notice of intent requirement of 4 CSR 240-4.020.

WHEREFORE, PREMISES CONSIDERED, based upon the foregoing, Nexus respectfully requests and prays the Missouri Public Service Commission waives the requirements of 4 CSR 240-4.020 and grant any other such relief to which it is entitled to in law and equity.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 10<sup>th</sup> day of January, 2011, to:

General Counsel's Office at gencounsel@psc.mo.gov;  
Office of Public Counsel at opcservice@ded.mo.gov;  
Cully Dale at cully.dale@psc.mo.gov;  
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/s/ Mark W. Comley

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