HURT, CROSBIE & MAY PLLC

William C. Hurt, Jr.
Scott A. Crosbie
William H. May, III
Michael D. Kalinyak

THE EQUUS BUILDING
127 WEST MAIN STREET
LEXINGTON, KENTUCKY 40507

Telephone - (859) 254-0000
Facsimile - (859) 254-4763
mmalone@hcm-law.com

Matthew R. Malone
Aaron D. Reedy
James L. Deckard
Jacob K. Michul

October 3, 2014

Via Hand-Delivery
Mr. Jeff DeRouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

RE: *Nexus Communications, Inc.; Letter Requesting Confidential Treatment Dated 2/10/2014; No Case # - FCC Form 555*

Dear Mr. DeRouen:

Please find attached for filing an original and ten (10) copies of Nexus Communications, Inc. request for rehearing.

Please place the documents of file. Should you have any questions regarding the enclosed, please contact me at your convenience.

Regards,

Matthew Malone

C: File

Enc.

Davis Wright Tremaine LLP

Suite 800
1919 Pennsylvania Avenue NW
Washington, DC 20006-3401

James W. Tomlinson
202.973.4253 tel.
202.973.4499 fax

jimtomlinson@dwt.com

October 3, 2014

Mr. Jeff R. Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602-0615

Re: Nexus Communications, Inc.
Letter Requesting Confidential Treatment dated 2/10/14
PSC Reference: No Case # - FCC Form 555
Request for Rehearing

Dear Mr. Derouen:

In accordance with KRS 278.400, Nexus Communications, Inc. ("Nexus") hereby requests rehearing of the decision of the Commission to deny confidential treatment of portions of Nexus' FCC Form 555 filing submitted on February 10, 2014. The basis of this decision is described in a letter dated September 11, 2014.[1] As detailed below, rehearing is warranted because denial of confidential treatment was based on an erroneous understanding of the underlying facts.

The letter indicates that Nexus' request for confidential treatment was denied because the Commission apparently believes that the subscriber count and retention data reported on the Form 555 "is publicly reported to both the Federal Communications Commission ("FCC") and the Universal Service Administrative Company ("USAC")." That, however, is not the case. To clarify, Nexus' Form 555s were submitted ***confidentially*** to both the FCC and USAC. Specifically, Nexus requested confidential treatment of its Form 555s from the FCC and USAC[2] in accordance with 47 C.F.R. §§ 0.457 and 0.459. Please see attached Exhibit 1 (request to the FCC) and Exhibit 2 (request to USAC). The FCC has not acted on Nexus' request, and

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[1] KRS 278.400 specifies that rehearing may be requested "within twenty (20) days after the service of the order" and that service "is complete three (3) days after the date the order is mailed." Accordingly, this rehearing request is timely filed because the deadline is October 4, 2014.

[2] As explained in the attached request for confidential treatment to USAC, the FCC's confidentiality rules are made binding upon USAC by a Memorandum of Understanding in effect between USAC and the FCC.

therefore, Nexus' filings are have been afforded confidential treatment by both entities in accordance with 47 C.F.R. § 0.459(d)(3).[3] As a result, Nexus' Form 555 for Kentucky has been not publicly disclosed to any governmental or private entity.

As noted in its initial confidentiality request, Nexus' subscriber count and retention data is generally recognized as confidential or proprietary and, if openly disclosed, would permit an unfair commercial advantage to Nexus' competitors for Lifeline-supported services. Exhibits 1 and 2 set forth multiple reasons why confidential treatment of this competitively sensitive data is appropriate under KRS 61.878 and 807 KAR 5:001, Section 13.

Accordingly, Nexus respectfully requests that the Commission reconsider its initial decision, and grant Nexus' request to afford confidential treatment to Nexus' subscriber count and retention data in its Form 555.

Respectfully submitted,

James W. Tomlinson

James W. Tomlinson
Attorney for Nexus Communications, Inc.

cc: Jeb Pinney, Staff Attorney

[3] 47 C.F.R. § 0.459(d)(3) states that the FCC "may defer acting on requests that material or information submitted to the [FCC] be withheld from public inspection until a request for inspection has been made … The information will be afforded confidential treatment … until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted."

Exhibit 1
Motion to FCC for Confidential Treatment

STAMP & RETURN

Davis Wright Tremaine LLP

Suite 800
1919 Pennsylvania Avenue NW
Washington, DC 20006-3401

Danielle Frappier
202.973.4242 tel
daniellefrappier@dwt.com

January 31, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Request for Confidential Treatment of Nexus' Filing of FCC Form 555
WC Docket No. 11-42

Dear Secretary Dortch:

Pursuant to Sections 0.457 and 0.459 of the Commission's rules, Nexus Communications, Inc. ("Nexus") hereby requests confidential treatment of its FCC Form 555 filing for data year 2013. Specifically, Nexus requests that these filings be withheld from routine public inspection, as they contain information that is of an extremely commercially-sensitive nature and that constitutes trade secrets. The confidential materials have been clearly marked **"CONFIDENTIAL—NOT FOR PUBLIC INSPECTION,"** as instructed on the FCC Secretary's web page.

Section 0.457(d) of the Commission's rules provides that this information is automatically protected under the Commission's confidentiality procedures because it contains trade secret information.[1] Section 0.457 of the Commission's rules also requires that the Commission treat as confidential documents that contain "trade secrets and commercial or financial information . . . not routinely available for public inspection."

As you are aware, these Commission regulations implement and incorporate exemptions from the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905. *See* 47 C.F.R. § 0.457(d). Under these exemptions, information is exempt from public disclosure if it is (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential in nature. 5 U.S.C. § 552(b)(4). The information being provided by Nexus is exempt from public disclosure under the aforementioned exemptions and the FCC's regulations because it constitutes commercial and financial information, obtained from a person, which is confidential in nature.[2]

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[1] 47 C.F.R. § 0.459(a) ("If the materials are specifically listed in § 0.457, such a request is unnecessary.")

[2] Under Exemption 4 of the FOIA, the terms "commercial" and "financial" are to be given their "ordinary

Similarly, Section 1905 of Title 18 of the United States Code makes it unlawful for federal government agencies or employees to disclose information relating to 'the trade secrets, processes, operations, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation, or association...." Information that is exempt from release under Exemption 4 of the FOIA is prohibited from being disclosed, under 18 U.S.C. § 1905, unless disclosure is "authorized by law" by another statute other than FOIA.[3] Because no other statute authorizes the release of the information at issue here, disclosure of the Documents is prohibited by the criminal provisions of 18 U.S.C. § 1905.[4]

Nevertheless, in light of a Wireline Competition Bureau issued in April 2013 denying confidential treatment for Nexus' 2012 FCC Form 555 filings and Nexus' Application for Review currently pending before the Commission, Nexus is also making a showing that the information would also qualify for protection pursuant to Commission rule 0.459, and is concurrently filing a request for confidential treatment with USAC and relevant state public utility commissions.[5] As required in rule 0.459, Nexus is providing below a statement of the reasons for withholding the information marked confidential, as well as a statement of facts underlying the information. **If upon review of this request, FCC decides not to grant this request, Nexus requests that FCC refrains from reviewing the enclosed materials and immediately contact the undersigned counsel.**

(1) Identification of the specific information for which confidential treatment is sought;

Nexus seeks to withhold from public inspection and otherwise seeks confidential treatment of the information contained in the enclosed FCC Forms 555, which contain state-specific subscriber counts, including the number of subscribers that responded to re-certification contacts, the number of ineligible subscribers, and other information regarding Nexus'

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meaning," and thus include information in which a submitter has a "commercial interest" *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *accord, Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974), *cert denied*, 421 U.S. 963 (1975). "Commercial interest" has been interpreted broadly to include anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). The term "person," for FOIA purposes, includes entities such as Nexus. *See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 871 n.15 (D.C. Cir. 1987) ("For FOIA purposes a person may be a partnership, corporation, association, or public or private organization other than an agency.").

[3] *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (Exemption 4 and 18 U.S.C. § 1905 are "coextensive" and § 1905 prohibits the disclosure of confidential business information unless release is authorized by a federal statute other than FOIA); *see also* 47 C.F.R. § 0.457(d).

[4] *See CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987).

[5] *In Re Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555*, Application for Review, WC Docket 11-42 (filed May 13, 2013) (hereinafter "Nexus Application for Review") (seeking review of *In Re Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555*, Order, 28 FCC Rcd 5535 (WCB rel. Apr. 29, 2013)); 47 C.F.R. § 0.459. A copy of the Nexus Application for Review is attached.

communications services ("confidential information"). Nexus has marked each page of the response "**CONFIDENTIAL—NOT FOR PUBLIC INSPECTION.**"

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

Nexus is providing this confidential information to FCC pursuant to 47 C.F.R. § 54.416(b).

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

Nexus is a privately-held entity that does not publicly disclose its subscriber counts, either state wide or in terms of the number of ineligible subscribers, de-enrolled subscribers, or other characteristics of its subscribers in terms of their eligibility status.

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

The market of providing communications services is highly competitive, and the Lifeline market in which Nexus operates is very highly competitive. There hundreds of Lifeline competitors, and many new firms looking to enter the Lifeline market on a daily basis. As the Commission is aware, the Lifeline wireless market is highly competitive. Very large entities such as TracFone and Virgin Mobile are major players, and in each state where Nexus operates, other, smaller wireless Lifeline eligible telecommunications carriers ("ETCs") actively compete for the business of eligible telecommunications consumers. The Commission has recognized, endorsed, and relied upon this competition in the course of determining the fundamental rules it has established to govern this market segment, including its rules regarding which entities are permitted to compete in it. For example, in the 2012 Lifeline Reform Order, the Commission stated:[6]

> [Enforcing the Section 214(e)(1) facilities requirement is not necessary] to ensure that Lifeline-only ETCs have charges, practices, classifications, and regulations for Lifeline service that are just and reasonable and not unjustly or unreasonably discriminatory. [Such ETCs] necessarily will face existing competition in the marketplace from the Lifeline offerings of the incumbent wireline carriers in the same designated areas, as well as other carriers, such as facilities-based wireless providers. Competition should help to keep their rates and other terms and

[6] *In Re Lifeline and Link Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC 6656 (2012) at ¶¶ 371, 378 (footnotes omitted, emphasis added).

> conditions of service just and reasonable and not unjustly or unreasonably discriminatory. The additional competition that they provide would do more to ensure just and reasonable rates and terms than a requirement to use their own facilities.
>
> ...
>
> Our public-interest inquiry must include consideration of whether forbearance would promote competitive market conditions, including the extent to which such forbearance would enhance competition among providers of telecommunications services. We conclude that forbearance from the facilities requirement ***will enhance competition among retail providers that service low-income subscribers***. Lifeline-only ETCs offer eligible consumers an additional choice of providers for telecommunications services. The prepaid feature that many Lifeline-only ETCs offer is an attractive alternative for subscribers who need the mobility, security, and convenience of a wireless phone, but who are concerned about usage charges or long-term contracts.

Given that the Commission has taken steps to enhance competition in this market segment, and relied upon the existence of competition to achieve its regulatory purposes, it is essential that the Commission be mindful of the deleterious impact on competition of requiring market participants to publicly reveal information that competitors in a traditional, non-regulated market would not normally disclose. Failure to respect the confidential nature of competitively relevant business information would be arbitrary and irrational because it would be contrary to, and undermine, the assumptions underlying and embodied in the Commission's basic approach to regulating this market segment.

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

There can be no question that information specifically identifying the number of customers that Nexus has (or has lost – see below) in each state in which it operates is extremely sensitive and confidential business information. No normal, unregulated, competitive business would ever routinely publish this information, and courts have found its confidential nature to be sufficiently obvious not to require any detailed analysis of the issue.[7] In a competitive market, different firms will employ different strategies for marketing, pricing, customer outreach, etc. Revealing how many customers Nexus has in each state will allow its competitors to see the precise degree to which Nexus' unique marketing and related efforts have been successful, diminishing the value of those efforts by allowing competitors to determine when and whether to copy them.

[7] *See, e.g.*, L'Amy, Inc., v. LePage, 2000 U.S. Dist. LEXIS 22957 (D. Conn. 2000) (finding as a fact that information about, inter alia, the "number" of customers constitutes "confidential information").

Indeed, the Commission itself has recognized in the Lakin Law Firm case that the competitive nature of information that "would enable competitors to estimate carrier revenues for specific product families, particular customers, and geographic areas [would give] competitors a substantial competitive advantage."[8] The information for which Nexus is here seeking confidential treatment is even more specific than that at issue in the Lakin case, and, therefore, even more potentially damaging to Nexus' competitive position.[9]

This is an even greater concern in the case of the state-by-state, month-by-month, category-by-category (non-usage versus non-response) figures for de-enrollment contained in the Form 555. While all Lifeline customers meet basic eligibility requirements set out by the Commission (*e.g.*, participation in the federal Food Stamp program), there are various sub-groups within the overall market segment of eligible consumers. The marketing and customer outreach strategies of different Lifeline ETCs focus on different sub-groups. Providing state-by-state, month-by-month information about what portion of Nexus' customer base was de-enrolled for non-response and for non-usage will provide valuable information to competitors regarding the long-term economic benefits of targeting the market segments that are most responsive to Nexus' efforts. In an unregulated competitive market, rivals could obtain such information only by making their own decisions regarding the market segments on which to focus and trying their own competitive strategies. It would be rare indeed for an unregulated, competitive firm to publicly disclose how many customers it is losing, much less provide a categorization of those customers. Moreover, there is no way of which Nexus is aware for competitors to even estimate these customer loss figures, other than via disclosure of Nexus' confidential information. Each month, a Lifeline ETC such as Nexus will gain new customers, lose some customers as a result of normal "churn," and lose some customers as a result of de-enrollments. Even if a competitor were able to develop some estimate of the overall size of the ETC's customer base (which would be far from easy), what mix of new customers, normal churn, and de-enrollments led to a given overall customer base would normally be utterly opaque to the competitor – as it should be. Competitors have no right to know how effective rivals' marketing or customer outreach efforts are on a month-by-month basis, and certainly no right to understand where their rivals are focusing their marketing efforts to offset de-enrollment and churn, as opposed to trying to simply grow the underlying customer base. The harm to Nexus' competitive position in this context

[8] *In Re The Lakin Law Firm*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004) at ¶ 6 (internal quotes omitted).

[9] This conclusion does not change even if it is possible for competitors, with some effort, to try to "reverse engineer" subscriber counts via other data, nominally publicly available. Indeed, the Lakin Law Firm case specifically protected information the disclosure of which was competitively problematic only in combination with publicly available information, and when the information only allowed competitors to "estimate" their rivals' sensitive information. *See also Skybridge Spectrum Foundation v. FCC*, 842 F.Supp. 2d 65, 81-82 (D.D.C. 2012). The fact that a competitor, with non-trivial effort based on public data, can develop estimates of its rivals' market position and other sensitive business information, does not justify making it easy for that result to occur by directly publishing the sensitive information. *See, e.g., Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

would be caused solely and directly by the Commission's failure to protect Nexus' confidential information.

Nexus is enclosing a copy of the Nexus Application for Review for additional discussion of the harm that would result if its confidential information were released.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

Nexus has consistently sought to keep the confidential information from being publicly disclosed to the extent permissible under state and federal law. *See, e.g.,* Nexus Application for Review *supra* note 5.

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

Nexus has not previously made this information available to the public and only provides this information to its attorneys and advisors on a need-to-know basis.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

Nexus does not foresee a determinable date or timeframe after which it will no longer consider this information highly confidential, commercially-sensitive trade secret information.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Nexus' Request for Review of a Wireline Competition Bureau order denying confidential treatment of Nexus' 2012 FCC Form 555 filings has been pending since May 2013 and remains pending. The resolution of that Request for Review will likely be decisive regarding the confidentiality status of its 2013 FCC Form 555 filings being made today. The Commission should therefore keep the present filing confidential until a final, non-appealable resolution is made regarding the 2012 filings.

Moreover, there is no substantial or even identifiable public benefit to be obtained from requiring public disclosure of Nexus' state-by-state (much less month-by-month) subscriber and de-enrollment counts. As noted above, in this market segment the Commission itself has directly embraced the promotion of competition as not only in the public interest, but as critically important to assuring that subscribers have the best array of service choices. Taking steps that interfere with vigorous competition – and revelation of confidential information clearly does interfere with it – would therefore undermine the public benefits that competition is intended to promote. To the extent that the Commission is concerned with being able to monitor

and report on the success of its efforts to eliminate duplication and waste in the Lifeline program, that purpose is entirely served by industry-wide aggregate data. Even with Nexus' information treated as confidential, the Commission would be able to report that on a nationwide or statewide basis, all ETCs combined de-enrolled a certain number of subscribers for non-usage, or that a certain percentage of duplicates were found, etc. And, of course, the key metric of the success of the Commission's efforts to more effectively manage the Lifeline program is not in data bearing on any specific, individual, ETC, but rather in the rate at which the Lifeline fund as a whole grows or contracts.

The foregoing establishes that this confidential information is subject to confidential treatment pursuant to the FCC's rules at 47 C.F.R. sec. 0.457, 0.459, and 18 U.S.C. sec. 1905, and that it contains information containing trade secrets, and commercial and financial information in a company- specific manner that has not been previously made public, and that is otherwise prohibited from being publicly disclosed.

Respectfully submitted,

Danielle Frappier

Exhibit 2
Motion to USAC for Confidential Treatment

Davis Wright Tremaine LLP

Suite 800
1919 Pennsylvania Avenue NW
Washington, DC 20006-3401

Danielle Frappier
202.973.4242 tel
daniellefrappier@dwt.com

STAMP & RETURN

January 31, 2014

David Capozzi
General Counsel
Universal Service Administrative Company
2000 L Street, NW
Washington, DC 20036

Re: Request for Confidential Treatment of Nexus' Filing of FCC Form 555
WC Docket No. 11-42

Dear Mr. Capozzi:

Pursuant to Sections 0.457 and 0.459 of the Commission's rules, Nexus Communications, Inc. ("Nexus") hereby requests confidential treatment of its FCC Form 555 filing for data year 2013. Specifically, Nexus requests that these filings be withheld from routine public inspection, as they contain information that is of an extremely commercially-sensitive nature and that constitutes trade secrets. The confidential materials have been clearly marked "**CONFIDENTIAL—NOT FOR PUBLIC INSPECTION,**" as instructed on the FCC Secretary's web page.

Section 0.457(d) of the Commission's rules provides that this information is automatically protected under the Commission's confidentiality procedures because it contains trade secret information.[1] Section 0.457 of the Commission's rules also requires that the Commission and its contractors such as USAC, treat as confidential documents that contain "trade secrets and commercial or financial information . . . not routinely available for public inspection."

As you are aware, these Commission regulations implement and incorporate exemptions from the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905. *See* 47 C.F.R. § 0.457(d). Under these exemptions, information is exempt from public disclosure if it is (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential in nature. 5 U.S.C. § 552(b)(4). The information being provided by Nexus is exempt from public disclosure under the aforementioned

[1] 47 C.F.R. § 0.459(a) ("If the materials are specifically listed in § 0.457, such a request is unnecessary.")

exemptions and the FCC's regulations because it constitutes commercial and financial information, obtained from a person, which is confidential in nature.[2]

Similarly, Section 1905 of Title 18 of the United States Code makes it unlawful for federal government agencies or employees to disclose information relating to 'the trade secrets, processes, operations, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation, or association...." Information that is exempt from release under Exemption 4 of the FOIA is prohibited from being disclosed, under 18 U.S.C. § 1905, unless disclosure is "authorized by law" by another statute other than FOIA.[3] Because no other statute authorizes the release of the information at issue here, disclosure of the Documents is prohibited by the criminal provisions of 18 U.S.C. § 1905.[4]

Nevertheless, in light of a Wireline Competition Bureau issued in April 2013 denying confidential treatment for Nexus' 2012 FCC Form 555 filings and Nexus' Application for Review currently pending before the Commission, Nexus is also making a showing that the information would also qualify for protection pursuant to Commission rule 0.459, and is concurrently filing a request for confidential treatment with the Commission and relevant state public utility commissions.[5] As required in rule 0.459, Nexus is providing below a statement of the reasons for withholding the information marked confidential, as well as a statement of facts underlying the information. **If upon review of this request, FCC decides not to grant this request, Nexus requests that FCC refrains from reviewing the enclosed materials and immediately contact the undersigned counsel.**

---

[2] Under Exemption 4 of the FOIA, the terms "commercial" and "financial" are to be given their "ordinary meaning," and thus include information in which a submitter has a "commercial interest" *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *accord, Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974), *cert denied*, 421 U.S. 963 (1975). "Commercial interest" has been interpreted broadly to include anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). The term "person," for FOIA purposes, includes entities such as Nexus. *See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 871 n.15 (D.C. Cir. 1987) ("For FOIA purposes a person may be a partnership, corporation, association, or public or private organization other than an agency.").

[3] *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (Exemption 4 and 18 U.S.C. § 1905 are "coextensive" and § 1905 prohibits the disclosure of confidential business information unless release is authorized by a federal statute other than FOIA); *see also* 47 C.F.R. § 0.457(d).

[4] *See CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987).

[5] *In Re Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555*, Application for Review, WC Docket 11-42 (filed May 13, 2013) (hereinafter "Nexus Application for Review") (seeking review of *In Re Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555*, Order, 28 FCC Rcd 5535 (WCB rel. Apr. 29, 2013)); 47 C.F.R. § 0.459. A copy of the Nexus Application for Review is attached.

(1) Identification of the specific information for which confidential treatment is sought;

Nexus seeks to withhold from public inspection and otherwise seeks confidential treatment of the information contained in the enclosed FCC Forms 555, which contain state-specific subscriber counts, including the number of subscribers that responded to re-certification contacts, the number of ineligible subscribers, and other information regarding Nexus' communications services ("confidential information"). Nexus has marked each page of the response "**CONFIDENTIAL—NOT FOR PUBLIC INSPECTION.**"

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

Nexus is providing this confidential information to FCC pursuant to 47 C.F.R. § 54.416(b).

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

Nexus is a privately-held entity that does not publicly disclose its subscriber counts, either state wide or in terms of the number of ineligible subscribers, de-enrolled subscribers, or other characteristics of its subscribers in terms of their eligibility status.

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

The market of providing communications services is highly competitive, and the Lifeline market in which Nexus operates is very highly competitive. There hundreds of Lifeline competitors, and many new firms looking to enter the Lifeline market on a daily basis. As the USAC is aware, the Lifeline wireless market is highly competitive. Very large entities such as TracFone and Virgin Mobile are major players, and in each state where Nexus operates, other, smaller wireless Lifeline eligible telecommunications carriers ("ETCs") actively compete for the business of eligible telecommunications consumers. The Commission has recognized, endorsed, and relied upon this competition in the course of determining the fundamental rules it has established to govern this market segment, including its rules regarding which entities are permitted to compete in it. For example, in the 2012 Lifeline Reform Order, the Commission stated:[6]

[6] *In Re Lifeline and Link Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC 6656 (2012) at ¶¶ 371, 378 (footnotes omitted, emphasis added).

> [Enforcing the Section 214(e)(1) facilities requirement is not necessary] to ensure that Lifeline-only ETCs have charges, practices, classifications, and regulations for Lifeline service that are just and reasonable and not unjustly or unreasonably discriminatory. [Such ETCs] necessarily will face existing competition in the marketplace from the Lifeline offerings of the incumbent wireline carriers in the same designated areas, as well as other carriers, such as facilities-based wireless providers. Competition should help to keep their rates and other terms and conditions of service just and reasonable and not unjustly or unreasonably discriminatory. The additional competition that they provide would do more to ensure just and reasonable rates and terms than a requirement to use their own facilities.
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> ...
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> Our public-interest inquiry must include consideration of whether forbearance would promote competitive market conditions, including the extent to which such forbearance would enhance competition among providers of telecommunications services. We conclude that forbearance from the facilities requirement ***will enhance competition among retail providers that service low-income subscribers***. Lifeline-only ETCs offer eligible consumers an additional choice of providers for telecommunications services. The prepaid feature that many Lifeline-only ETCs offer is an attractive alternative for subscribers who need the mobility, security, and convenience of a wireless phone, but who are concerned about usage charges or long-term contracts.

Given that the Commission has taken steps to enhance competition in this market segment, and relied upon the existence of competition to achieve its regulatory purposes, it is essential that the Commission be mindful of the deleterious impact on competition of requiring market participants to publicly reveal information that competitors in a traditional, non-regulated market would not normally disclose. Failure to respect the confidential nature of competitively relevant business information would be arbitrary and irrational because it would be contrary to, and undermine, the assumptions underlying and embodied in the Commission's basic approach to regulating this market segment.

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

There can be no question that information specifically identifying the number of customers that Nexus has (or has lost – see below) in each state in which it operates is extremely sensitive and confidential business information. No normal, unregulated, competitive business would ever routinely publish this information, and courts have found its confidential nature to be

sufficiently obvious not to require any detailed analysis of the issue.[7] In a competitive market, different firms will employ different strategies for marketing, pricing, customer outreach, etc. Revealing how many customers Nexus has in each state will allow its competitors to see the precise degree to which Nexus' unique marketing and related efforts have been successful, diminishing the value of those efforts by allowing competitors to determine when and whether to copy them.

Indeed, the Commission itself has recognized in the Lakin Law Firm case that the competitive nature of information that "would enable competitors to estimate carrier revenues for specific product families, particular customers, and geographic areas [would give] competitors a substantial competitive advantage."[8] The information for which Nexus is here seeking confidential treatment is even more specific than that at issue in the Lakin case, and, therefore, even more potentially damaging to Nexus' competitive position.[9]

This is an even greater concern in the case of the state-by-state, month-by-month, category-by-category (non-usage versus non-response) figures for de-enrollment contained in the Form 555. While all Lifeline customers meet basic eligibility requirements set out by the Commission (*e.g.*, participation in the federal Food Stamp program), there are various sub-groups within the overall market segment of eligible consumers. The marketing and customer outreach strategies of different Lifeline ETCs focus on different sub-groups. Providing state-by-state, month-by-month information about what portion of Nexus' customer base was de-enrolled for non-response and for non-usage will provide valuable information to competitors regarding the long-term economic benefits of targeting the market segments that are most responsive to Nexus' efforts. In an unregulated competitive market, rivals could obtain such information only by making their own decisions regarding the market segments on which to focus and trying their own competitive strategies. It would be rare indeed for an unregulated, competitive firm to publicly disclose how many customers it is losing, much less provide a categorization of those customers. Moreover, there is no way of which Nexus is aware for competitors to even estimate these customer loss figures, other than via disclosure of Nexus' confidential information. Each month, a Lifeline ETC such as Nexus will gain new customers, lose some customers as a result of normal "churn," and lose some customers as a result of de-enrollments. Even if a competitor

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[7] *See, e.g.*, L'Amy, Inc., v. LePage, 2000 U.S. Dist. LEXIS 22957 (D. Conn. 2000) (finding as a fact that information about, inter alia, the "number" of customers constitutes "confidential information").

[8] *In Re The Lakin Law Firm*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004) at ¶ 6 (internal quotes omitted).

[9] This conclusion does not change even if it is possible for competitors, with some effort, to try to "reverse engineer" subscriber counts via other data, nominally publicly available. Indeed, the Lakin Law Firm case specifically protected information the disclosure of which was competitively problematic only in combination with publicly available information, and when the information only allowed competitors to "estimate" their rivals' sensitive information. *See also Skybridge Spectrum Foundation v. FCC*, 842 F.Supp. 2d 65, 81-82 (D.D.C. 2012). The fact that a competitor, with non-trivial effort based on public data, can develop estimates of its rivals' market position and other sensitive business information, does not justify making it easy for that result to occur by directly publishing the sensitive information. *See, e.g., Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

were able to develop some estimate of the overall size of the ETC's customer base (which would be far from easy), what mix of new customers, normal churn, and de-enrollments led to a given overall customer base would normally be utterly opaque to the competitor – as it should be. Competitors have no right to know how effective rivals' marketing or customer outreach efforts are on a month-by-month basis, and certainly no right to understand where their rivals are focusing their marketing efforts to offset de-enrollment and churn, as opposed to trying to simply grow the underlying customer base. The harm to Nexus' competitive position in this context would be caused solely and directly by USAC's failure to protect Nexus' confidential information.

Nexus is enclosing a copy of the Nexus Application for Review for additional discussion of the harm that would result if its confidential information were released.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

Nexus has consistently sought to keep the confidential information from being publicly disclosed to the extent permissible under state and federal law. *See, e.g.,* Nexus Application for Review *supra* note 5.

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

Nexus has not previously made this information available to the public and only provides this information to its attorneys and advisors on a need-to-know basis.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

Nexus does not foresee a determinable date or timeframe after which it will no longer consider this information highly confidential, commercially-sensitive trade secret information.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Nexus' Request for Review of a Wireline Competition Bureau order denying confidential treatment of Nexus' 2012 FCC Form 555 filings has been pending since May 2013 and remains pending. The resolution of that Request for Review will likely be decisive regarding the confidentiality status of its 2013 FCC Form 555 filings being made today. The Commission should therefore keep the present filing confidential until a final, non-appealable resolution is made regarding the 2012 filings.

Moreover, there is no substantial or even identifiable public benefit to be obtained from requiring public disclosure of Nexus' state-by-state (much less month-by-month) subscriber and de-enrollment counts. As noted above, in this market segment the Commission itself has directly embraced the promotion of competition as not only in the public interest, but as critically important to assuring that subscribers have the best array of service choices. Taking steps that interfere with vigorous competition – and revelation of confidential information clearly does interfere with it – would therefore undermine the public benefits that competition is intended to promote. To the extent that USAC or the Commission is concerned with being able to monitor and report on the success of its efforts to eliminate duplication and waste in the Lifeline program, that purpose is entirely served by industry-wide aggregate data. Even with Nexus' information treated as confidential, the USAC or the Commission would be able to report that on a nationwide or statewide basis, all ETCs combined de-enrolled a certain number of subscribers for non-usage, or that a certain percentage of duplicates were found, etc. And, of course, the key metric of the success of USAC and the Commission's efforts to more effectively manage the Lifeline program is not in data bearing on any specific, individual, ETC, but rather in the rate at which the Lifeline fund as a whole grows or contracts.

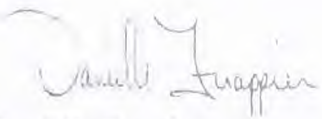
Finally, Nexus believes that this information is subject to confidentiality protections contained in USAC's MOU with the FCC, and this information is being provided in connection with a USAC proceeding. Specifically, the MOU provides that the following information is subject to confidential protections:[10]

> Information that is excluded by applicable statute or regulation from disclosure, provided that such statute (a) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of information to be withheld. Such information includes copyrighted or trademarked information.
>
> Information containing trade secrets or commercial, financial or technical information that (a) identifies company specific (i.e., non-aggregated) proprietary business information about a Universal Service Fund (USF) contributor (or a potential contributor) or its parent, subsidiary, or affiliate, and (b) has not previously been made publicly available.
>
> [. . .]
>
> Information regarding or submitted in connection with an audit or investigation of a USF contributor, potential USF contributor, USF beneficiary, applicant for USF support, or USAC Staff Person.

[10] Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company (Sept. 9, 2008) available at http://transition.fcc.gov/omd/usac-mou.pdf.

The foregoing establishes that this confidential information is subject to confidential treatment pursuant to the FCC's rules at 47 C.F.R. sec. 0.457, 0.459, and 18 U.S.C. sec. 1905, and that it contains information containing trade secrets, and commercial and financial information in a company- specific manner that has not been previously made public, and that is otherwise prohibited from being publicly disclosed.

Respectfully submitted,



Danielle Frappier