

September 27, 2013



Darrell Nitschke, Executive Secretary  
North Dakota Public Service Commission  
State Capitol  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Re: Application to Protect Confidential Trade Secret Material pursuant to N.D.A.C. Chapter 69-02-09 in Case No. PU-13-098 – Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e)

Dear Mr. Nitschke:

Pursuant to N.D.A.C. Chapter 69-02-09, Nexus Communications, Inc. (“Nexus”) hereby applies to the North Dakota Public Service Commission (“Commission”) for trade secret protection of the following materials:

- Nexus’ Confidential Summary of 2012 FCC Form 555 Data
- Nexus’ Confidential Summary of its FCC In-depth Data Validation Results
- The information in the 2011 audit of Nexus by the Universal Service Administrative Company (“USAC”), shown to the Commission staff *in camera*

As explained below, the summaries of the 2012 FCC Form 555 data and In-depth Data Validation (“IDV”) results contain competitively sensitive state-by-state subscriber and de-enrollment data, which constitute trade secrets pertaining to Nexus’ Lifeline services. Disclosure of those trade secrets would harm Nexus and provide economic benefits to Nexus’ competitors. Consequently, Nexus requests trade secret protection pursuant to moves the Commission for a protective order pursuant to N.D.A.C. § 69-02-09-04.

### 1. General description of the nature of the information sought to be protected

The FCC Form 555 contains detailed information about Nexus’ Lifeline business. Specifically, the information included on FCC Form 555 includes, for each state where Nexus operates as an Eligible Telecommunications Carrier (“ETC”):

- the number of Nexus subscribers,
- the number of lines provided to other non-ETC resellers,
- the number contacted for recertification,
- the number of subscribers that responded to the recertification request,
- the number that failed to respond,
- the number that responded that they were no longer eligible for Lifeline,
- the number de-enrolled as a result of non-response or ineligibility,
- the number of subscribers who de-enrolled prior to recertification, and
- a month-by-month breakdown of the number subscribers de-enrolled for non-usage in the preceding 12 months.

Similarly, the IDV data contains month-by-month breakdown, for each SAC code, of:

- the number of intra-company duplicates,
- and inter-company duplicates, the number of total duplicates,
- the number of total Nexus Lifeline subscribers in the state, and
- the percentage of total Nexus subscribers that were deemed duplicates.

Finally, USAC audited Nexus' compliance with applicable rules governing its receipt of Lifeline funding for wireless subscribers in Louisiana in June 2011. The USAC audit report contains information pertaining to Nexus' internal business processes and subscribers.

## **2. Explanation of why the information derives independent economic value, actual or potential, from not being generally known to other persons**

Both the state and national Lifeline wireless markets are highly competitive. Major national players as well as smaller wireless Lifeline eligible telecommunications carriers ("ETCs") vigorously compete for the business of eligible telecommunications consumers. Nationally, Nexus competes with major national carriers TracFone Wireless, and Virgin Mobile USA, as well as a host of smaller Lifeline carriers. In North Dakota alone, Nexus expects fierce competition from Budget PrePay, Telrite, Total Call Mobile and Boomerang Wireless.

The FCC 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. *See, e.g., Lifeline and Link Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (FCC rel. Feb. 6, 2012) at ¶¶ 371, 378. It is essential that the Commission be mindful of the deleterious impact on competition that would be posed by *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 contrary to, and undermine, the assumptions underlying and embodied in the FCC's statements concerning the importance of competition.

Given the context above, there can be no question that information specifically identifying the number of subscribers that Nexus has (or has lost) in each state where Nexus is an ETC is extremely sensitive and confidential business information that Nexus has a right to protect. The courts have found the confidential nature of subscriber numbers to be sufficiently obvious not to require any detailed analysis of the issue. *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”). In a competitive market, different firms will employ different strategies for marketing, pricing, customer outreach, etc. Revealing how many subscribers Nexus has in the states where it has been designated as an ETC would allow its competitors to see the precise degree to which Nexus’ unique marketing efforts have been successful, diminishing the value of those efforts by allowing competitors to determine when and whether to copy them.

The FCC also has recognized 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.” *In re The Lakin Law Firm*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004) at ¶ 6 (internal quotes omitted). The information for which Nexus seeks confidential treatment is even more specific than that at issue in *Lakin*, and, therefore, even more potentially damaging to Nexus’ competitive position. This is an even greater concern in the case of the month-by-month, category-by-category (non-usage versus non-response) figures for state-by-state de-enrollment contained in the FCC Form 555, and the month-by-month breakdown of duplicates by SAC pertaining to the IDV process. While all Lifeline subscribers meet basic federal eligibility requirements (*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 month-by-month information about what portion of Nexus’ state-by-state subscriber base was de-enrolled (whether for non-response, non-usage, or duplication) would 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.

In light of the above, the information here is plainly proprietary commercial information that derives economic value from not being generally known to other persons. The information relates directly to Nexus’ business, and disclosure could cause substantial economic harm to Nexus’ competitive position in the market for Lifeline services. 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. Nor do competitors have the right to learn which areas of Nexus operations were improved or otherwise changed as a result of the USAC audit, or the issues that prompted those improvements or changes. The potential harm to Nexus' competitive position if the Commission fails to protect Nexus' confidential information thus is substantial.

Finally, the fact that other ETCs have decided to disclose subscriber and de-enrollment information does nothing to alter the confidential nature of such information, nor does it reduce its sensitivity, or the potential harm to Nexus. It does not matter what other ETCs have chosen to do. Nexus is entitled to confidential treatment of its information if its competitors could use that information against Nexus in the marketplace. While other companies are free to waive confidentiality protections for their own data, no other company (or number of other companies) can waive Nexus' claim of confidentiality. Nexus is a very different company than its main national competitors, Virgin Mobile USA and TracFone Wireless, which are much larger companies that operate in more market segments. Accordingly, Nexus is more vulnerable to harm that would result from disclosure of its Lifeline operations. Nexus obviously cannot control what other carriers can do, but other carriers' actions should not control disclosure of Nexus' confidential information.

### **3. An explanation of why the information is not readily ascertainable by proper means by other persons**

The subscriber count information in the FCC Form 555 reports for the data year 2012 is not readily ascertainable. The reports themselves with Nexus' subscriber data are not posted on the FCC website, and are not otherwise readily accessible. The subscriber count and de-enrollment data is not available on the Universal Service Administrative Company ("USAC") website, nor can it be accurately determined from the disbursement figures posted there.

Although the USAC website does list disbursement amounts, subscriber counts cannot be determined by dividing Lifeline disbursement amounts by the current \$9.25 per subscriber support level for several reasons. First, the \$9.25 amount was phased in gradually ending in October 2012, according to a non-public schedule chosen by each individual ETC. Moreover, the subscriber counts in the FCC Form 555 filed on January 31, 2013 concern subscribers provided service in May 2012. Second, USAC disbursement amounts are affected by other factors, such as projections based on a USAC-proprietary formula that is not public and was in effect until October 2012. Third, the disbursement amounts are subject to adjustments by USAC or the carrier in the case of USAC audits or ETC adjustments to their Form 497 filings (which are subject to revision on a rolling 12-month deadline). Similarly, the de-enrollment data – and in particular, the breakdown of subscribers de-enrolled for inactivity, self-reported ineligibility, or failure to respond – cannot be "reverse engineered" from the amount of Lifeline funds disbursed to Nexus. The IDV data and USAC audit report are also not readily ascertainable to the public. Nexus is not aware of any means for the public to obtain IDV data, nor is it aware of the FCC or USAC publicly revealing any company-specific IDV data. Nor is Nexus aware of any means for the public to obtain the USAC audit report.

In any case, the sensitivity of Nexus' FCC Form 555 numbers and IDV data would not change even if it were possible for competitors, with some effort, to try to "reverse engineer" subscriber counts via other data that is 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). Competitors' ability to make educated guesses about proprietary numbers does not make the more precise actual numbers "readily ascertainable."

With respect to the audit report, USAC audit reports are not made publicly available and in fact, the report itself is marked "CONFIDENTIAL. . . USAC PROPRIETARY." USAC is bound by the terms of its Memorandum of Understanding ("MOU") to keep such reports confidential. The MOU defines confidential information as including "[i]nformation 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."<sup>1</sup>

**4. A general description of the persons or entities that would obtain economic value from disclosure or use of the information**

National and regional wireless Lifeline carriers could use the sensitive information in FCC Form 555 data and IDV data to gain competitive advantages over Nexus in the market for wireless Lifeline services. Other wireline and wireless carriers that offer Lifeline services along with non-Lifeline offerings could also gain economic value from disclosure of Nexus' FCC Form 555 numbers and IDV data. The means by which competitors could use the FCC Form 555 data to gain competitive advantages are described in detail in the enclosed affidavit, previously filed with the FCC in connection with Nexus' FCC request for confidential treatment. The affidavit describes, in particular, how competing carriers could use FCC Form 555 data to measure their competitors' success in acquiring new subscribers, allowing them to evaluate their competitors' marketing efforts. The same analysis applies equally to the subscriber counts and duplication data stemming from the IDV process. Although a different analysis applies to the USAC audit report, that information is no less sensitive. Nexus competitors would naturally be very interested in any operational details of Nexus business contained in the audit, even to the point of copying Nexus' practices or adopting changes to their own processes based on the audit findings.

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<sup>1</sup> 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> at p. 19, Appendix A.

**5. Specific description of known competitors and competitors' goods and services that are pertinent to the tariff or rate filing**

Known competitors of Nexus include at least the following companies that focus on wireless Lifeline service and offer competing calling plans at no cost to low-income subscribers:

Assist Wireless, LLC  
Boomerang Wireless LLC d/b/a enTouch Wireless  
Budget PrePay, Inc. d/b/a Budget Mobile  
i-wireless LLC  
Conexions LLC d/b/a Conexion Wireless  
Easy Telephone Services Co. d/b/a Easy Wireless  
TAG Mobile, LLC  
Telrite Corporation d/b/a Life Wireless  
TerraCom Wireless  
Total Call Mobile  
TracFone Wireless d/b/a SafeLink Wireless  
True Wireless, Inc.  
Virgin Mobile USA, LP d/b/a Assurance Wireless  
YourTel America, Inc.

Each of these competitors offers wireless Lifeline service offerings that compete directly with Nexus Lifeline calling plans.

**6. Description of the efforts used to maintain the secrecy of the information**

Nexus has been consistent in requesting confidential treatment of its subscriber counts and de-enrollment numbers. On January 31, 2013, Nexus filed its FCC Form 555 reports with the Federal Communications Commission ("FCC") and with Universal Service Administrative Company ("USAC"). In both cases, Nexus requested confidential treatment of state-specific subscriber count and subscriber de-enrollment information under the provisions of 47 C.F.R. §§ 0.457 and 0.459, as well as the Freedom of Information Act, Exemption 4 (5 U.S.C. § 552(b)(4)) and the Trade Secrets Act, 18 U.S.C. § 1905. Although the FCC's Wireline Competition Bureau issued an order on April 29, 2013, denying Nexus' request for confidential treatment of its FCC Form 555 filings, that order is currently under review pursuant to an application for review filed by Nexus on May 13, 2013. Nexus expects that the FCC will ultimately extend protection to Nexus' subscriber counts and de-enrollment numbers. Nexus has also been diligent in protecting its IDV data and the USAC audit report. To date, Nexus has made no public disclosures of either the IDV data or the contents of the audit report.

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In light of the foregoing, Nexus hereby moves the Commission for a protective order pursuant to N.D.A.C. § 69-02-09-04 to protect information described above, including the specific subscriber counts and de-enrollment figures contained in Nexus' FCC Form 555 reports, Nexus' IDV data, and the information contained in Nexus' USAC audit report.

Please let me know if you have any further concerns regarding this issue.

Very truly yours,

 for Danielle Frappier

Danielle Frappier  
Of Counsel for Nexus Communications, Inc.

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some examples of how this information can be used to disadvantage the entity that reports it. This request was prompted by the Federal Communications Commission ("FCC") April 29, 2013 Order in docket WC 11-42 ("Order") that denied a request filed by Nexus seeking confidential treatment of its FCC Form 555 filing with the FCC and the Universal Service Administrative Company ("USAC") for data year 2012 ("Form 555 data").

***B. Summary***

4. Access to Form 555 de-enrollment data can be used by knowledgeable industry participants to ascertain competitively sensitive information about the company making the filing; for example, it allows an industry participant to estimate competitors' churn and new acquisitions, pinpoint their weaknesses, and evaluate the merits of various product offerings, marketing and customer care strategies. Importantly, because there are significant variations across companies' churn, rates of customer acquisitions, product offerings, marketing strategies, etc., an industry participant can readily correlate the Form 555 information to the specifics of the filing company's operations, thus revealing the successes and failures of certain marketing strategies, use of equipment (handsets), pricing strategies, etc. While the information reported in Form 555 may not necessarily be sufficient in and of itself to support a formal quantitative analysis of a competitor's strengths and weaknesses, it is obvious that the information can be used by industry participants, with detailed knowledge of the industry and competitive activities, to derive competitively sensitive information on, and insights into, the activities of other market participants.

It is therefore entirely reasonable for a company to guard this information and keep it from competitors.

## II. ANALYSIS

5. Form 555 contains five general types of subscriber counts: (1) Total Subscribers (Block A); (2) Results of Eligible Telecommunications Carrier's ("ETC") Re-certification through Direct Contact (Blocks C through G); (3) Subscribers De-Enrolled Prior to Re-certification (Blocks H and L); (4) Results of Re-certification through State Administrator or ETC Access to Eligibility Data (Blocks I through K), and (5) Subscribers De-enrolled for Non-Usage (Section 4). For simplicity, when discussing the data contained in these blocks, we omit reference to Form 555, and instead refer to these data simply as "Block A" or "Section 4" data.
  
6. The Order claimed that Total Subscriber Counts (Block A) can be derived from the already publicly available data on Lifeline disbursements. This is not true. The following complicating factors eliminate the existence of a simple functional relationship between subscriber counts and reported disbursements. First, historical disbursements do not necessarily reflect actual subscriber counts because of subsequent future revisions and true ups: An ETC may discover an error in the subscriber counts after it already filed its initial claim for disbursements (Form 497). The company has up to twelve months from the data month to which the claim applied to correct this error by filing revisions to its originally claimed amounts.<sup>1</sup> As an example, an ETC may have discovered in September 2012 that it under-reported

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<sup>1</sup> See instructions to Form 497 at <http://www.usac.org/li/tools/forms.aspx>.

its May 2012 subscribers on Form 497. It may choose to file the revisions by May 2013. The actual disbursements associated with this revision would take place with a certain lag – perhaps, in June 2013. In other words, until mid-2013 the public does not have the “final” version of disbursement data – data necessary to accurately calculate subscriber counts in May 2012. Yet, Form 555 discloses these data on January 31, 2013. Another situation in which a link between subscribership and disbursement is broken is a disbursement adjustment following an audit: Assume that an audit showed that an ETC was overpaid in some state for prior years – causing a need for a “negative” true up. If the ongoing monthly disbursements in this state are relatively small, the true up may be spread across other jurisdictions in order for USAC to recover the original over-payment.

7. Second, the actual disbursements made by USAC in a given month are affected not only by subscriber counts, but also by the per unit payments, which are not always apparent to the public. At least for the May 2012 data at issue in this specific case, the generally applicable rate of \$9.25/subscriber/month was in the process of being phased in, so there was no uniform rate across all companies and states. It is difficult, and would require highly specialized research (if possible at all) to establish when each ETC shifted to the new \$9.25 rate. More generally, for ETCs serving a mix of non-Tribal and Tribal customers, different per-subscriber amounts apply to different

classes of customers, eliminating any direct relationship between disbursements and simple subscriber counts.<sup>2</sup> So the Order is simply factually wrong on this point.

8. In addition, even if one could carefully cull data about Tribal lands, past adjustments, etc., to develop a set of reasonable assumptions to apply to a competitor's disbursements to estimate overall subscriber counts, it is clear that the Order erred in suggesting (at ¶6) that this can be done "easily." Putting aside the complicating factors discussed above, to derive the Total Subscriber Counts appearing in Block A from the disbursement data, the public would need to download and sort out the disbursement data for multiple months to identify all payments applicable to Total Subscriber Counts in a specific month such as May 2012. For example, for its May 2012 subscribers in Iowa, Tracfone Wireless Inc. ("Tracfone") received Lifeline disbursements in three installments: in May 2012 (Projection Override), June 2012 (True-up) and January 2013 (True-up).<sup>3</sup> It is far worse from a competitive perspective to simply state a firm's subscriber counts, than to have a situation in which a competitor must undertake a detailed, in-depth effort to derive a possible estimate of those counts. The difficulty of the process (including the investment of time and specialized knowledge required), as well as the uncertainty introduced into the results by having to make assumptions about various matters, is itself a form of protection against competitors obtaining and making use of the subscriber count data.

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<sup>2</sup> Consider as an example a hypothetical \$10/month rate for non-Tribal subscribers and a corresponding hypothetical \$20/month for Tribal subscribers. In that scenario, a disbursement of \$40,000 could reflect 4,000 non-Tribal subscribers and no Tribal subscribers; 2,000 Tribal subscribers and no non-Tribal subscribers; or any number of intermediate variations on Tribal versus non-Tribal subscriber counts.

<sup>3</sup> See <http://www.usac.org/li/tools/disbursements/default.aspx>.

9. Putting aside total subscriber counts, the four other types of subscriber counts (Blocks C through L and Section 4 data) are not publicly available from sources other than Form 555 at all.
10. Even if a firm could determine a competitor's total number of subscribers, total subscriber counts would not fully capture ongoing changes in the firm's customer base. For example, stable subscriber counts may be a result of two completely different underlying business realities: (a) Company 1 – Low Churn: This company would have stable customer base (the same customers stay with the company month after month, and that the company is not acquiring new customers); (b) Company 2 – High Churn: This company would have a dynamic customer base (the majority of customers leave after one month but the same number of customers is being acquired). In the first case the customer churn is very low; in the second case it is very high. Low churn (customer turnover) is generally desirable because it keeps administrative and customer acquisition cost low. Acquisition of new customers is also desirable as it generally increases overall revenues, and presumably profits. The Form 555 information showing the “ins” and “outs” behind competitors' subscriber counts allows one to more accurately assess the nature of a company's business model and the effectiveness of its strategies. For example, if Company 2 (the High Churn company) knows that Company 1 has low churn, it may study and mimic some of Company 1's business strategies to lower its own unfavorable churn. Similarly, if Company 1 is aware of Company 2's success in acquiring new customers, it may study and mimic Company 1's marketing strategies to promote customer growth. Without question, this aspect of the Form 555 information allows an informed

industry participant to put competitors' total subscriber counts into a competitively sensitive perspective.

11. Blocks C through L and Section 4 provide information on total customer losses. This information allows the estimation of customer acquisitions by combining the customer loss data with the total subscriber counts. This concept is illustrated in the following Table 1, which uses Tracfone's data for Iowa as an example.<sup>4</sup> The first three data lines of this table contain subscriber counts: For May 2012, subscriber counts are taken directly from Form 555. For December 2012 they were estimated from publicly available Lifeline disbursement data (noting, as discussed above, that this is not actually an exact process). Lines four through six contain information on customer losses taken from in Form 555. The last line combines information from the two sources to produce an estimate of the new customer acquisitions.

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<sup>4</sup> Note that all examples in this affidavit are based on the data of ETCs other than Nexus', because their Form 555 data are available publicly. While our example uses Tracfone's data, our broader point is that anyone can "mine" company Form 555 data (including Nexus' data) to extract information that is competitively sensitive.

Table 1.

**Derivation of New Customer Counts from Form 555 and Lifeline Disbursement Data:  
An Example Using Data for Tracfone Wireless - Iowa**

Line	Measure	Source	Count
L1	Subscriber Count, May-12	Form 555 Block A	17,295
L2	Subscriber Count, Dec-12	Derived from disbursement data	14,789
L3 = L2-L1	Net Change in Subscribers May to Dec.		-2,506
L4	De-Enrolled prior to Re-Certification	Form 555 Blocks H + L	2,916
L5	De-Enrolled Due to Non-Response or Ineligibility	Form 555 Blocks G + K	2,877
L6=L4+L5	Total De-Enrolled		5,793
L7=L3+L6	Estimate of New Customer Acquisitions		3,287

As shown in Table 1, the total subscriber counts indicate that between May and December 2012, Tracfone experienced net subscriber losses of 2,506 customers. Form 555 shows that there were a total of 5,793 customers lost. It follows that over that same period, approximately 3,297 new customers were added.<sup>5</sup> The information on Tracfone's customer acquisitions can now be used to evaluate the effectiveness of Tracfone's marketing efforts and the competitiveness of its product offerings – factors about which industry participants will be well-informed. Moreover, this ability to mine useful competitive intelligence by combining Form 555 data with pre-existing market knowledge is enhanced when the analysis is performed for multiple companies, not just one. This is precisely why companies typically keep this type of information private.

<sup>5</sup> Here for simplicity we are assuming that de-enrollment due to non-response or ineligibility has happened by December 2012. We recognize that in reality some customers may have been scheduled for de-enrollment but not actually de-enrolled by that date.

12. Section 4, which contains data showing de-enrollment for non-usage, allows for additional insight into a company's operations and strategies. For example, non-usage can arise from the customer not using telephone service often. This type of customer is less desirable than are customers with higher demand for telephone services (for example, such customers may be more likely to upgrade their basic subsidized plan with additional minutes, text and data capabilities). Alternatively, the non-usage can be caused by poorly designed or malfunctioning handsets. Pre-paid low income ETCs typically provide a "free" (often re-furbished) handset with a warranty that can be as short as one month,<sup>6</sup> or as long as one year.<sup>7</sup> If the handset malfunctions beyond the warranty period, the user may need to get a new handset at his or her expense (which may not be economically feasible), or may obtain a new "free" handset by switching to another company. Information on a company's handsets is not reported in Form 555, but industry participants know what types of handsets are being used by which competitors. They can then match this knowledge with the Form 555 information to come to competitive conclusions they could not otherwise reach.
13. Further competitively sensitive information can be obtained by isolating de-enrollment for non-usage from the set of factors affecting subscribership in order to see the impact of new customer acquisition efforts. Because non-usage reported on Form 555 is broken out on a monthly basis, its combination with monthly subscriber counts would allow for a granular analysis of month-to-month dynamics of customer outflows and inflows. This is shown in Table 2, which again is based on data for

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<sup>6</sup> Budget PrePay Lifeline offering (<https://www.budgetmobile.com/questions/>).

<sup>7</sup> Virgin Mobile Assurance Wireless offering (<http://www.assurancewireless.com/Public/FAQs.aspx>).

Tracfone in Iowa. This table combines monthly subscriber counts with Section 4 data:

Table 2.

**Change in Subscriber Counts Net of De-Enrollement for Non-Usage  
An Example Using Data for Tracfone Wireless - Iowa**

Month	Subscriber Count	Net Change in Subscribers from Previous Month	De-Enrolled for Non-Usage	Change in Subscribers if Exclude De-Enrolled due to Non-Usage
(a)	(b)	(c) calculated from (b)	(d) Form 555 Sec. 4	(e) = (c) + (d)
Jan-12	11,380		32	
Feb-12	12,757	1,377	91	1,468
Mar-12	13,477	720	119	839
Apr-12	14,312	835	200	1,035
May-12	17,295	2,983	336	3,319
Jun-12	17,796	501	279	780
Jul-12	17,577	-219	913	694
Aug-12	17,220	-357	621	264
Sep-12	16,567	-653	759	106
Oct-12	15,806	-761	590	-171
Nov-12	15,265	-541	525	-16
Dec-12	14,789	-476	325	-151
<b>Total</b>		<b>3,409</b>	<b>4,790</b>	<b>8,199</b>

As shown in Table 2, column (c), Tracfone has been losing Iowa subscribers starting in July 2012. De-enrollment for non-usage (column (d)) was a significant factor to this loss. However, if de-enrollment for non-usage is taken out of the equation (column (e)), it turns out that the dynamics of Tracfone's remaining subscribership actually *improves*. Specifically, the time period between July and September 2012 now exhibits a *gain* in customers, not a loss. Assume hypothetically that in July 2012

Tracfone was trying out a new marketing instrument such as direct mail advertisement. An examination of "raw" subscribership data (column (b)) would suggest that the new marketing did not work because the overall subscribership was declining in the three months following the trial. However, when de-enrollment for non-usage is isolated from total subscriber counts, the result is a modest upward movement in subscribership. To summarize this example, Form 555 data, combined with on-the-ground knowledge of what the filing company was doing in the marketplace (knowledge that competitors would have) would allow competitors to gain competitive insights into the hypothetical marketing effort that Tracfone undertook at its own risk and expense, but without the need for the competitors to engage in the same trial. As a result, the company undertaking innovative trials is put at competitive disadvantage because the competitively sensitive results of its efforts are in effect made public in its Form 555. The long-term outcome is that the public disclosure of Form 555 data would discourage experimentation and innovations in the industry.

14. More generally, by categorizing customer outflows, Form 555 allows one to estimate competitors' churn and new acquisitions, pinpoint their weaknesses, evaluate the merits of various product offerings, marketing and customer care strategies. This information is particularly useful because the data on churn, and rates of customer acquisitions vary across companies. Similarly, product offerings, marketing strategies, handset policies, and etc., vary across companies, so that the observed Form 555 metrics can be correlated with the specifics of each ETC's operations. This is shown in Table 3, which pools Form 555 data of major pre-paid wireless ETC

(Nexus' principal competitors).<sup>8</sup> This table presents various types of customer outflows (de-enrollment) as percentages of total subscribership (which permits comparisons between companies). The three bottom rows contain the average,<sup>9</sup> minimum and maximum values. For these percent ("rates") metrics, bold font indicates "better than average" values.

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<sup>8</sup> Based on Form 555 filings available from the FCC. Each ETC-row is based on the summation of state level Form 555 data.

<sup>9</sup> Straight average for all percent metrics except for column (c), which is a weighted average.

Table 3.

**Customer Loss by Reason: Comparison of Major Pre-Paid Eligible Telecommunications Carriers**  
*(Derived from Form 555 for data year 2012 submissions)*

ETC	Number of Subscribers Claimed on the May FCC Form 497	% De-Enrolled as a Result of Non-Response or Ineligibility	% De-Enrolled for Non-Usage (Average of Jun- Dec)	% De- Enrolled Prior to Re- certification Attempt	% Responded to ETC Contact
(a)	(b)	(c)	(d)	(e)	(f)
Form 555 Block Source:	A	(G + K) / A	Section 4 Average / A	(H + L) / A	D / C
Tracfone Wireless	3,958,811	18%	3%	21%	82%
Virgin Mobile USA	3,687,756	44%	0.02%	22%	60%
Telrite Corporation	648,787	20%	9%	159%	62%
Budget PrePay	504,279	21%	4%	36%	63%
Yourtel America	338,346	22%	5%	56%	44%
TAG Mobile	310,500	33%	8%	99%	17%
Terracom	241,668	24%	6%	50%	48%
Assist Wireless	191,780	28%	5%	101%	27%
Global Connections	172,701	24%	11%	97%	54%
Affordable Phone	160,023	36%	10%	120%	9%
Cintex Wireless	153,330	25%	7%	94%	44%
Smith Bagley	72,170	15%	1%	36%	86%
DPI Teleconnect	53,599	21%	9%	136%	33%
Easy Telephone	53,247	53%	12%	59%	25%
<b>Total</b>	<b>10,546,997</b>	<b>29%</b>	<b>6%</b>	<b>77%</b>	<b>47%</b>
Minimum		15%	0.02%	21%	9%
Maximum		53%	12%	159%	86%

As shown in Table 3, rates of de-enrollment vary significantly by company. For example, in terms of de-enrollment as a result of non-response or ineligibility (column (b)), Virgin Mobile (at 44%) is the company with the second worst results. However, in terms of de-enrollment for non-usage (column (d)), Virgin Mobile had by far the best results (at 0.02%). One possible explanation for the very low de-enrollment for non-usage is that Virgin Mobile has a lower incidence of non-working

handsets compared to other companies. As mentioned above, Virgin Mobile offers a one-year warranty on its handsets, while some other companies offer only a one-month warranty. At the same time, Virgin Mobile allows subscribers to use only Virgin Mobile phones. In contrast, some other companies, such as Telrite,<sup>10</sup> allow subscribers to use subscriber-owned unlocked phones, which may increase the likelihood of phone problems. As shown in Table 3, consistent with this possibility, Telrite has above average rates of de-enrollment for non-usage. While the cause of the variation may not be apparent to a casual observer, it most surely will be evident to active industry participants that are familiar with the particulars of the different handsets, etc. Again, the Form 555 information allows them to connect the dots and reach competitively sensitive conclusions.

15. The data on response rate to ETC contact (column (f) of Table 3) is yet another metric that permits one to evaluate the relative effectiveness of different business models, and potentially ascertain differences between various geographic markets. For example, customers may not have responded to the ETC contact because they were no longer eligible for service, or simply because they did not pay attention to ETC's communication or did not understand the urgency of the required response. A comparison of the response rates to ETC contact across companies allow companies to evaluate their methods and less successful companies to adopt those of from more successful ones. As seen in this table, the two companies with the highest response rates are Smith Bagley at 86% (driven largely by the response rates of its tribal customers), and Tracfone at 82%. The Smith Bagley experience may also draw other

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<sup>10</sup> See <http://www.lifewireless.com/>.

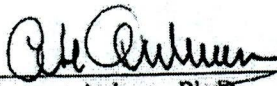
ETCs' attention of the Tribal land markets because high response rates in these markets make it easier to retain customers. Again, Form 555 discloses competitive sensitive information.

16. To summarize, Form 555, especially when combined with other data that competitors will have, allows one to estimate a reporting company's inflows and outflows of customers and break down its outflows into specific causes. These customer movements provide indications of the company relative weaknesses and strengths, which is competitively sensitive information not otherwise available. The Order's factual conclusion that the information in and obtainable from a Form 555 is not confidential and/or is not competitively sensitive is simply erroneous.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2013.

  
August Ankum, Ph.D.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2013.



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Olesya Denney, Ph.D.