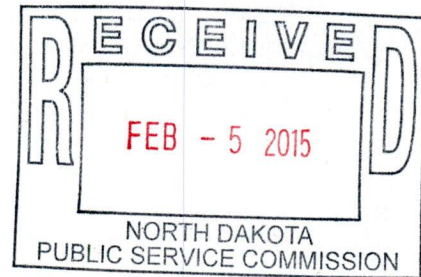


February 4, 2015

VIA U.S. MAIL & EMAIL

North Dakota Public Service Commission
Attention: Darrell Nitschke, Executive Secretary
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480



Re: *Confidential Material in Nexus Communications, Inc. d/b/a ReachOut Wireless' FCC Form 555 filing for year 2014*

Dear Mr. Nitschke:

Pursuant to N.D.A.C. § 69-02-09-01, Nexus Communications, Inc. ("Nexus") hereby applies to the North Dakota Public Service Commission for confidential treatment of the competitively sensitive state-by-state subscriber counts and de-enrollment figures contained in Nexus' FCC Form 555 reports. As a result, Nexus is making efforts to maintain the confidentiality of all of its wireless FCC Form 555 forms, including those in North Dakota. As explained below, the aforementioned data constitute trade secrets pertaining to Nexus' Lifeline services, disclosure of which would harm Nexus and provide economic benefits to Nexus' competitors.

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 requested 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.

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Application for Trade Secret Protection

Nexus Communications, Inc.

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 gained or 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) state-specific figures in the FCC Form 555. 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. 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 larger companies operating 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 2014 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. The disbursement amounts are subject to adjustments by USAC or the carrier to their Form 497 filings (which are subject to revision on a rolling 12-month deadline). For the same reason, the de-enrollment data – and in particular, the breakdown of subscribers de-enrolled for inactivity, self-reported ineligibility, or failure to respond – cannot reliably be "reverse engineered" from the amount of Lifeline funds disbursed.

In any case, the sensitivity of Nexus' FCC Form 555 reports 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."

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 reports, in North Dakota and elsewhere, 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 reports.

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. In its filings with both the Federal Communications Commission ("FCC") and with USAC, Nexus has 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, and the materials remain confidential pending the outcome of that proceeding. Nexus expects that the FCC will ultimately extend protection to Nexus' subscriber counts and de-enrollment numbers.

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In light of the foregoing, Nexus requests that the numbers contained in Nexus' FCC Form 555 reports should be treated as confidential under the terms of N.D.A.C. § 69-02.

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

Very truly yours,

Davis Wright Tremaine LLP



Alan J. Galloway
AJG/cap

Enclosures

