

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Request for Confidential Treatment of Nexus) WC Docket No. 11-42
Communications, Inc. Filing of FCC Form)
555)
)

ORDER

Adopted: April 29, 2013

Released: April 29, 2013

By the Chief, Wireline Competition Bureau:

1. In this order, we deny a request filed by Nexus Communications, Inc. (Nexus) seeking confidential treatment of its FCC Form 555 filing with the Federal Communications Commission (Commission) and the Universal Service Administrative Company (USAC) for data year 2012.

I. BACKGROUND

2. In the *Lifeline Reform Order*, the Commission required eligible telecommunications carriers (ETCs) to conduct comprehensive re-certification and non-usage reviews to ensure Lifeline subscribers continue to be eligible to receive the supported service and are using the service on a regular basis. Subscribers that are no longer eligible or have not used the service in a 60-day period are subject to de-enrollment. The Commission also required ETCs to submit the results of their re-certification process and non-usage de-enrollments on FCC Form 555 by January 31 of each year.¹ In particular, the FCC Form 555 requires all carriers receiving Lifeline support to provide by study area code (i) the number of subscribers claimed on FCC Form(s) 497 filed with USAC in May; (ii) the number of subscribers contacted to recertify eligibility and the number that were de-enrolled or are scheduled for de-enrollment for non-response or ineligibility; and (iii) the number of subscribers that were de-enrolled each month for non-usage of prepaid service (service for which ETC does not assess or collect a monthly fee from its subscribers) during the relevant calendar year.

3. The FCC Form 555 used by ETCs is approved by the Office of Management and Budget under OMB Control No. 3060-0819. When submitting the request for approval of that form pursuant to the Paperwork Reduction Act,² the Commission stated that it was not requesting ETCs to submit confidential information to the Commission, and that if ETCs believed that the requested information was confidential, they could request confidential treatment under section 0.459 of the Commission's rules.³

¹ See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket. Nos. 11-42 et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6715-16, 6722, 6767, paras. 130-32, 148, 257 (2012) (*Lifeline Reform Order*); see also 47 C.F.R. §§ 54.405(e)(3), 54.416.

² See 44 U.S.C. § 3507.

³ See <http://www.reginfo.gov/public/do/DownloadDocument?documentID=346743&version=2>; 47 C.F.R. § 0.459.

No comments, however, were submitted with regard to the Commission's statement that the data requested are not confidential.⁴

4. Nexus submitted its FCC Form 555 on January 31, 2013. At the same time, Nexus also filed a request for confidential treatment of the information contained in its FCC Form 555, claiming that the state-specific subscriber counts, including the number of subscribers that responded to re-certification contacts, the number of ineligible subscribers, and other information regarding the company's communications services are confidential pursuant to sections 0.457 and 0.459 of the Commission's rules, as well as the Freedom of Information Act (FOIA), Exemption 4 and the Trade Secrets Act.⁵

5. To determine whether this information should be kept confidential, we must determine whether the preponderance of the evidence shows that disclosure of the information will cause Nexus substantial competitive harm.⁶ Exemption 4 of the FOIA permits the Commission, in its discretion, to withhold from disclosure any documents containing either (i) trade secrets; or (ii) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.⁷

II. DISCUSSION

6. We find that Nexus has not met the burden of persuasion to establish confidentiality for the information covered by its request. Nexus claims that its state-by-state Lifeline subscriber count and de-enrollments in the Lifeline program are confidential and that release of such information would cause it competitive damage in the market by revealing the company's marketing and outreach strategies.⁸ With regard to the subscriber count information, each ETC's Lifeline disbursement amounts are publicly available at USAC's website on a monthly basis for each study area code, which means the public can easily deduce, with a high level of accuracy, an ETC's Lifeline subscriber count based on the amount of public funds it receives.⁹ We therefore find that the ETC subscriber counts by study area on Form 555 are not competitively sensitive because they are essentially already publicly available. We are also not persuaded that public inspection of the number of Nexus' subscribers that were de-enrolled for failure to re-certify their service or failure to use such service within 60 days would cause Nexus substantial competitive harm. Nexus offers only a vague assertion that disclosure of de-enrollments will provide valuable information to competitors of which market segments are most responsive to Nexus' outreach

⁴ See http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201207-3060-011.

⁵ See Nexus Request for Confidential Treatment of FCC Form 555, WC Docket No. 11-42, at 1-2 (filed Jan. 31, 2013); Letter from Christopher W. Savage, Counsel to Nexus, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 11-42 (filed Feb. 19, 2013) (Nexus Supplement). See also 5 U.S.C. § 552(b)(4) (FOIA Exemption 4); 18 U.S.C. § 1905 (Trade Secrets Act); 47 C.F.R. § 0.457.

⁶ See 47 C.F.R. § 0.459(d); see also 47 U.S.C. § 552, et seq. Section 0.457 sets forth the categories of records that are not routinely available for public inspection, i.e., accorded confidential treatment, and section 0.459 sets forth the procedures for submitting requests that materials or information be withheld from public inspection. See generally 47 C.F.R. §§ 0.457, 0.459. For instance, section 0.459(b)(3) provides that a request for confidentiality shall, among other things, include an "explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged." 47 C.F.R. § 0.459(b)(3).

⁷ 5 U.S.C. § 552(b)(4); see also *Nat'l Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir. 1976).

⁸ See Nexus Supplement at 2-3.

⁹ See generally USAC Low Income disbursement tool, <http://www.usac.org/li/tools/distributions/default.aspx>. Given that the support amounts for voice service are set at a flat rate amount, the public can easily calculate subscriber counts for each ETC based on the amount of disbursements each month for each state. *Id.*

efforts.¹⁰ Moreover, every other ETC, except for Nexus, has publicly filed the same information Nexus claims would damage its competitive position in the market if it becomes public, which calls into question whether Nexus' information is competitively sensitive when all other competing ETCs have publicly released their information.¹¹ Nexus provides no explanation of how release of this information puts it at a competitive disadvantage when all other competitors have disclosed the same information. Based on these facts, we are not convinced that public inspection of the information contained in FCC Form 555 will cause substantial competitive harm to Nexus in the market.¹²

III. ORDERING CLAUSE

7. ACCORDINGLY, IT IS ORDERED, pursuant to section 0.459(d)(2) of the Commission's rules, 47 C.F.R. § 0.459(d)(2), that the request for CONFIDENTIALITY by Nexus Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief
Wireline Competition Bureau

¹⁰ See Nexus Supplement at 3.

¹¹ See *id.* at 2.

¹² Our conclusion is buttressed by the fact that the state of Iowa requires that Nexus's FCC Form 555 information be made public. Nexus has complied with that requirement by publicly filing Iowa-specific FCC Form 555 information before the Iowa Utilities Board because that state commission has determined that such information is not deemed confidential. See Nexus FCC Form 555 Iowa, Iowa Utilities Board, <https://efs.iowa.gov/cs/groups/external/documents/docket/mdaw/mtcw/~edisp/140164.pdf>.