



Federal Communications Commission  
Washington, D.C. 20554

REDACTED FOR PUBLIC INSPECTION

April 20, 2016

DA 16-426

**Via Certified Mail, Return Receipt Requested**

Rohan Ranaraja  
SAL Spectrum, LLC  
1001 Technology Drive  
Little Rock, Arkansas 72223

Re: SAL Spectrum, LLC – Request for Confidential Treatment of Subscriber Information  
Provided in FCC Form 175

Dear Mr. Ranaraja:

In accordance with Section 0.459(g),<sup>1</sup> this letter provides follow-up notice of our April 6, 2016, telephone conversation informing your counsel, David Kaufman, of our denial of SAL Spectrum, LLC's (SAL) request for confidential treatment of the subscriber information contained in its FCC Form 175 application to participate in Auction 1002 and related information submitted by attachment to the application, and of the timing for seeking review of our decision.<sup>2</sup>

In its application, SAL seeks a rural service provider bidding credit. An eligible applicant in Auction 1002 may request a 15 percent discount on its winning bid(s) using a rural service provider bidding credit. To be eligible for a rural service provider bidding credit, an applicant must be: (1) a service provider that is in the business of providing commercial communications services and, together with its controlling interests, affiliates, and the affiliates of its controlling interests, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers; and (2) serves predominantly rural areas, defined as counties with a population density of 100 or fewer persons per square mile.<sup>3</sup> In support of a claim for a rural service provider bidding credit, an applicant must provide the number of subscribers for itself, its controlling interests, affiliates, and the affiliates of its controlling interests in its FCC Form 175.<sup>4</sup>

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<sup>1</sup> 47 CFR § 0.459(g).

<sup>2</sup> This letter is being released today in redacted form to withhold from public inspection references to information submitted by the applicant during the FCC Form 175 application resubmission period. Consistent with our standard information disclosure procedure during an auction, we intend to release the unredacted version of this letter at such time as all resubmission phase application information is made available for public inspection.

<sup>3</sup> 47 CFR § 1.2110(f)(4)(i).

<sup>4</sup> See *Application Instructions for Broadcast Incentive Auction Scheduled To Begin on March 29, 2016; Instructions for FCC Form 175 Application To Participate in the Forward Auction (Auction 1002)*, Public Notice, 31 FCC Rcd 24, 42, para. 87 (WTB Jan. 19, 2016) (*Auction 1002 Application Instructions*).

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SAL submitted subscriber numbers in its FCC Form 175, as well as an explanation by attachment arguing the basis for its eligibility, in support of its request for a rural service provider bidding credit, and seeks confidential treatment thereof.<sup>5</sup> SAL argues that the subscriber information is entitled to confidential treatment because it constitutes “confidential commercial, proprietary information, which [SAL] and its affiliates routinely withhold from the public;” “is not otherwise available to the public, and has never been disclosed to the public, or any third parties;” “would place [SAL] at a severe competitive disadvantage by revealing the extent to which each individual affiliate can or cannot spread fixed costs of operation across a customer base, as well as the existing market share;” and is being submitted “‘involuntarily’, *i.e.*, as a prerequisite to receiving an otherwise unavailable government benefit.”<sup>6</sup>

We review requests for confidentiality on a case-by-case basis.<sup>7</sup> Section 0.459 of the Commission’s rules requires an entity requesting confidential treatment to submit a statement of the reasons for withholding the materials from inspection and the facts upon which those reasons are based. Mere conclusory or generalized allegations cannot support such a request.<sup>8</sup> Rather, the request must show by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552.<sup>9</sup>

SAL’s request does not justify withholding from public inspection the subscriber numbers intended to support SAL’s claim of eligibility for a rural service provider bidding credit, and public policy considerations favor disclosure of such supporting information. The Commission has held generally that it may publicly release confidential business information where the party has put that information at issue in a Commission proceeding or where the Commission has identified a compelling public interest in disclosing the information.<sup>10</sup> And specifically with regard to information submitted in support of receiving bidding credits in auction proceedings, it has held that both of these criteria are met: that in

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<sup>5</sup> SAL filed its request for confidential treatment of subscriber information of the applicant and certain affiliates submitted with its application during the initial Auction 1002 application filing window. [BEGIN CONF. INFO.]

[END CONF. INFO.] See FCC Form 175 of SAL Spectrum, LLC, Auction 1002, “Confidentiality Request re Subscriber Numbers,” (submitted Feb. 1, 2016) (Request); [BEGIN CONF. INFO.]

<sup>6</sup> See Request at 2-3; [BEGIN CONF. INFO.]

[END CONF. INFO.] SAL’s arguments address only the confidentiality of subscriber information and provide no reasons for withholding any other information submitted by attachment arguing the basis for its eligibility for the bidding credit.

<sup>7</sup> See *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24829, para. 17 (1998).

<sup>8</sup> *Application of Northeast Communications of Wisconsin, Inc.; Request for Confidential Treatment of Financial Information Contained in FCC Form 175 Filing in the Local Multipoint Distribution Service*, Memorandum Opinion and Order, 15 FCC Rcd 3289, 3291, para. 6 (2000) (*Northeast Communications*) (denying application for review by an auction applicant seeking confidentiality of financial information submitted in its short-form application in support of its claim of eligibility for a small business bidding credit).

<sup>9</sup> See 47 CFR § 0.459(d).

<sup>10</sup> See *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd at 24822, para. 7.

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seeking bidding credits based on certain criteria (here, the number of subscribers), the applicant has placed in issue the very information which it seeks to shield from public scrutiny, and that fairness to other auction participants requires that this information be available to the public; and that there is a compelling interest in having the basis for the bidding credit request be available to the public.<sup>11</sup> Therefore, consistent with the Commission's rules and prior decisions, balancing the public and private interests at stake, we find that there is a public interest in favor of publicly releasing SAL's subscriber count information.<sup>12</sup>

As a separate and independent basis for denying SAL's request for confidentiality, we find SAL's claim of potential competitive harm resulting from the disclosure of its subscriber numbers unconvincing and reject it. Given the eligibility requirements for qualifying for a rural service provider bidding credit, an applicant seeking this credit must by definition be an entity that, together with its controlling interests, affiliates, and the affiliates of its controlling interests, has fewer than 250,000 subscribers and serves predominantly rural areas.<sup>13</sup> Thus, the public will already have a general sense of the applicant's size in terms of subscribership based on the applicant's assertion of its eligibility for a rural service provider bidding credit (i.e., the applicant will be known to have a combined subscribership count of no more than 249,999).<sup>14</sup> We recognize that the *Auction 1002 Application Instructions* require an applicant seeking the credit to disclose separately the subscribers of each Disclosable Interest Holder and affiliate.<sup>15</sup> However, an applicant seeking this credit is not required to provide a detailed breakdown of the subscribers associated with any particular operating area, and SAL did not do so. This subscriber disclosure requirement applies uniformly to all applicants seeking eligibility for this bidding credit. Yet none of the other applicants seeking the credit have sought confidentiality for information concerning the numbers of their subscribers.<sup>16</sup> Indeed, Securities and Exchange Commission filings by SAL's parent company themselves have already disclosed certain subscriber information.<sup>17</sup> Accordingly, contrary to SAL's assertions, we are not persuaded that public disclosure of SAL's subscriber numbers places SAL at a substantial competitive disadvantage relative to other Auction 1002 applicants seeking a rural service

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<sup>11</sup> *Northeast Communications*, 15 FCC Rcd at 3291, para. 6; *AMTS Consortium, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 526, 530, para. 15 (2010) (citing *Northeast Communications* and distinguishing the denial of confidential treatment for information necessary to determine bidding credit eligibility from the grant of confidential treatment for other types of transactional information); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997) (*Bartholdi*) (holding that the public had a compelling interest in the information on unauthorized operations which was at issue because it had a direct bearing on the applicant's qualifications as a Commission licensee).

<sup>12</sup> See 47 CFR §§ 0.459(d)(2), 0.461(f)(4); *Lifeline and Link Up Reform and Modernization, etc.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7914, para. 284 (2015) (*Nexus Order*).

<sup>13</sup> See 47 CFR § 1.2110(f)(4)(i)(A)-(B).

<sup>14</sup> Cf. *Nexus Order*, 30 FCC Rcd at 7912, para. 280 (public release of subscriber count slightly more accurate than one already publicly available not shown to cause competitive harm).

<sup>15</sup> See *Auction 1002 Application Instructions*, 31 FCC Rcd at 42-43, paras. 87, 91-92.

<sup>16</sup> See *Nexus Order*, 30 FCC Rcd at 7912, para. 281 (fact that other companies publicly filed same information undercuts argument that release of information would cause substantial competitive harm).

<sup>17</sup> See, e.g., Atlantic Tele-Network, Inc., Annual Report (Form 10-K), at 5, 6, 42, 48 (Feb. 29, 2016).

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provider bidding credit or provides any sort of “blueprint” for SAL’s competitors in their marketing strategies.<sup>18</sup>

Furthermore, we find the cases SAL cites in support of its claim to be inapposite.<sup>19</sup> As a threshold matter, those cases do not involve subscriber numbers. *Mobile Relay Associates* concerns confidential treatment of customer lists containing customer names and numbers, *Antenna Systems* concerns confidential treatment of customer records, price lists, sales invoices, and presentations, and device and equipment manufacturing and distribution data, and *Ward & Mendelsohn* involves non-disclosure of customer sales contracts.<sup>20</sup> The type of sensitive customer-specific information at issue in those cases differs significantly from the aggregate financial or subscribership data that must be included in an auction application by an applicant seeking a bidding credit, as competitors could use such customer records, pricing, and data to directly solicit the parties’ customers.<sup>21</sup> Moreover, in *Ward and Mendelsohn* neither of the party’s competitors was being required to disclose its sales contracts; here, the subscriber numbers of all other applicants seeking a rural service provider bidding credit in Auction 1002 are publicly available.

Finally, while the Commission has simplified the process for a party to request confidential treatment of the data provided in Form 477, confidential treatment is not automatically granted as SAL suggests.<sup>22</sup> If the Commission receives a request for, or proposes disclosure of, the information at issue, the party seeking confidential treatment of its data must make a “full showing” under the Commission’s

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<sup>18</sup> We are equally unpersuaded by SAL’s argument that the subscriber numbers are entitled to confidential treatment based on SAL’s claim that the information has been submitted “involuntarily” as a prerequisite to receiving an otherwise unavailable government benefit. See Request at 2-3. Even if we were to assume for the sake of argument that an auction applicant’s submission of information required for eligibility for a bidding credit should be considered “involuntary,” we nonetheless find that SAL’s subscriber information does not meet the criteria for treating involuntarily submitted information as confidential. See *Bartholdi*, 114 F.3d at 281 (quoting *Nat’l Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (1974)) (“... [i]nformation obtained under compulsion will be considered confidential only ‘if disclosure . . . is likely to have either of the following effects: (1) to impair the government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.’”). SAL has also failed to satisfy its burden of demonstrating that disclosure of its subscriber numbers is likely to impair our ability to obtain this type of information from auction applicants in the future, particularly in light of the absence of any claim of confidentiality as to such information from other Auction 1002 participants.

<sup>19</sup> See Request at 3, citing *Antenna Systems & Supplies, Inc.*, 20 FCC Rcd 18972 (EB Spectr. Enf. Div. 2005) (*Antenna Systems*); *Mobile Relay Associates*, 14 FCC Rcd 18919 (WTB PSPWD 1999); *Ward & Mendelsohn, P.C.*, 88 FCC 2d 1049 (1981) (*Ward & Mendelsohn*).

<sup>20</sup> *Id.*

<sup>21</sup> See *Mobile Relay Associates*, 14 FCC Rcd at 18922-23, para. 8 (“customer records are among the most basic business records that a company uses in furtherance of its commercial activities”); *Antenna Systems*, 20 FCC Rcd at 18974, para. 6 (acknowledging that disclosure of Antenna Systems’ customer records, price lists, sales invoices and presentation could result in substantial competitive harm because its competitors could use this information to solicit its customers); *Ward & Mendelsohn*, 88 FCC 2d at 1052-53, para. 10.

<sup>22</sup> See *Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717, 7758-59, paras. 87-90 (2013).

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rules.<sup>23</sup> The Commission has made clear that it has not made any findings about whether the data elements requested in Form 477 would satisfy the Commission's standards for confidentiality.<sup>24</sup>

Accordingly, SAL's request for confidential treatment of subscriber information required to be submitted for assessing eligibility for a rural service provider bidding credit in its FCC Form 175 application for Auction 1002, as well as its request for confidential treatment of the argument it makes by attachment to the application in support of its eligibility claim, is denied. As we stated in our April 6, 2016, telephonic denial of SAL's request, SAL may file an application for review by the Commission of the denial of its confidentiality request or abandon its claim for a rural service provider bidding credit.<sup>25</sup> SAL may seek review of this decision within 10 business days of the release of this letter, that is, by May 4, 2016.<sup>26</sup> If it fails to do so, we will make the subscriber information contained in SAL's application and any such information submitted by attachment available to the public, consistent with our information disclosure procedures for Auction 1002 applications.<sup>27</sup>

This action is taken pursuant to authority delegated under Sections 0.131(c) and 0.331 of the Commission's rules.<sup>28</sup>

Sincerely,

Margaret W. Wiener  
Chief  
Auctions and Spectrum Access Division  
Wireless Telecommunications Bureau

cc: David Kaufman, Esq. (counsel to SAL Spectrum, LLC), via email and certified mail  
Jonathan Cohen, Esq. (counsel to SAL Spectrum, LLC), via email and certified mail

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<sup>23</sup> *Id.* at 7759, para. 90.

<sup>24</sup> *See id.* at 7758, para. 87. In any event, as discussed above, the public has a "compelling interest" in having access to information that bears on an auction applicant's eligibility for a bidding credit, which is not present in the Form 477 context. *Northeast Communications*, 15 FCC Red at 3291, para. 6.

<sup>25</sup> *See* 47 CFR § 0.459(g).

<sup>26</sup> To permit SAL adequate time to review and if necessary address the basis for our determination as set forth in this letter, we waive on our own motion the requirement in Section 0.459(g) of the Commission's rules, that an application for review be filed within 10 business days after the date of oral notice of denial of a request for confidentiality.

<sup>27</sup> *See Auction 1002 Application Instructions*, 31 FCC Red at 50, para. 125.

<sup>28</sup> 47 CFR §§ 0.131(c), 0.331.