

ARGUMENT

I. THE DEPARTMENT'S CONFIDENTIALITY STANDARDS

A. Statutory Standard

Information filed with the Department or its Divisions may be protected from public disclosure pursuant to G.L. c. 25C, § 5, which states in part:

The department may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the department shall protect only so much of the information as is necessary to meet such need.

The exemption afforded pursuant to G.L. c. 25C, § 5 is an exemption recognized under G.L. c. 4, § 7, cl. twenty-sixth (a) (“specifically or by necessary implication exempted from disclosure by statute”). *Budget Prepay, Inc.*, D.T.C. 11-12 (2012) at 5 (Hearing Officer Order); *T-Mobile Northeast LLC*, D.T.C. 12-4 (2012) at 5-6.

B. The Department's Three-Part Analysis

The Department has applied a three-part standard in applying G.L. c. 25C, § 5 in order to determine whether, and to what extent, information filed by a party may be protected from public disclosure. First, the information for which protection has been sought must constitute the type of information that can be exempted from public disclosure (*e.g.*, trade secrets, confidential, competitively sensitive or other proprietary information). Second, the party seeking protection must prove the need for its non-disclosure as public information. Third, where such a need has been demonstrated, protection will be accorded only to so much of that information as is necessary to meet the established need and the length of time such protection may be in effect may be limited. *See, e.g., Time Warner Cable, Inc.*, C.T.V. 03-4 (July 1, 2004) (Order on

Request for Confidential Treatment); *CoxCom, Inc., d/b/a Cox Communications*, D.T.C. 07-10 (May 30, 2008) (Order on Request for Confidential Treatment); *CoxCom, Inc., d/b/a Cox Communications*, D.T.C. 08-8 (June 23, 2009) (Hearing Officer Ruling on Motion for Protective Order); *CoxCom, Inc., d/b/a Cox Communications*, D.T.C. 10-10 (October 12, 2011); *Budget Prepay, Inc.*, D.T.C. 11-12 (2012) at 6 (Hearing Officer Order); and *T-Mobile Northeast LLC*, D.T.C. 12-4 (2012) at 6-9.

C. The Department's Application Of Confidentiality Standards

The Department acts upon requests for confidential treatment on a case-by-case basis when it applies statutory and decisional standards to determine whether specific information should be exempt from public disclosure. *Petition of Global Connection of America, Inc. d/b/a Stand Up Wireless*, D.T.C. 11-11 (2012) at 7 (Hearing Officer Order). A party seeking confidential treatment must fully support the basis for its request and provide specific explanation of the harm resulting from public disclosure of specific information. *T-Mobile Northeast LLC*, D.T.C. 12-4 (2012) at 7-8; *Budget Prepay, Inc.*, D.T.C. 11-12 (2012) at 6-7 (Hearing Officer Order).

Among the classes of information which have been considered competitively sensitive and accorded confidential treatment, upon a proper showing by the producing party, are marketing and advertising expenses and practices, internal training materials, policies and procedures; confidential calculations; personnel information; and corporate financial information of private companies. *T-Mobile Northeast LLC*, D.T.C. 12-4 (2012) at 7; *Budget Prepay, Inc.*, D.T.C. 11-12 (2012) at 8 (Hearing Officer Order).

The Department has traditionally accorded protection of confidential information for a period of years, in light of its competitively sensitive nature, subject to the right of the producing

party to request continued protection. *See, e.g., T-Mobile Northeast LLC*, D.T.C. 12-4 (2012) at 8-9 (granting protection for five years).

For the reasons below, the responses of Nexus to Department information requests provided under seal each meet the legal standards for an exemption from public disclosure. In support of this Motion, Nexus has submitted the attached Affidavit of its President, Steven Fenker (“Fenker Affidavit”).

II. THE INFORMATION PROVIDED BY NEXUS UNDER SEAL IS ENTITLED TO CONFIDENTIAL TREATMENT

As an initial matter, as the Department is aware, the market for Lifeline-supported wireless services is highly competitive in Massachusetts as well as in states in which Nexus currently operates. 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. Fenker Affidavit at ¶ 8. The Department has accorded ETC designation to a number of wireless carriers to date and as of this date, several additional requests for ETC designation are pending before the Department. It is essential that the Department 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.

A. Response to Record Request 8

Record Request 8 asks Nexus to provide:

a summary of recertification results submitted to the FCC in January 2013. Include: (a) the number of subscribers to be recertified; (b) how many subscribers were contacted directly and reviewed for income eligibility; (c) how many subscribers were de-enrolled and the reasons for de-enrollment; and (d) provide the above information by state, if possible.

1. The Requested Information is Confidential Information

The requested information is substantially that submitted to the FCC in Nexus' FCC Form 555 filings earlier this year. Nexus has consistently sought to keep its FCC Form 555 information confidential to the extent permissible under state and federal law. Nexus limits access to this information internally and only provides this information to its attorneys and advisors on a need-to-know basis. This information is maintained internally on a secure basis. Fenker Affidavit at ¶ 10.

As required by law, Nexus filed the requested information with the FCC and the Universal Service Administrative Company ("USAC").¹ Nexus requested confidential treatment from the FCC and USAC. 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.² Nexus has notified the Bureau that it intends to appeal its order to the full Commission. During the appeal process, Nexus' FCC Form 555 filings continue to be kept confidential.³ Fenker Affidavit at ¶ 11.

2. The Requested Information is Competitively Sensitive and Protection from Disclosure is Needed in Order to Avoid Substantial Competitive Harm to Nexus

¹ Nexus also was required to file a FCC Form 555 with each state commission in which it provides Lifeline service. To the extent permitted by law, Nexus made its state-specific submissions to state regulatory commissions on a confidential basis. To Nexus' knowledge, only one state commission, the Iowa Utilities Board, has made Nexus' FCC Form 555 available to the public. However, the Iowa Utilities Board publicly disclosed only the *Iowa-specific* form. Fenker Affidavit at ¶ 12.

² *Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555*, WC Docket 11-43, DA 13-871 (Wireline Competition Bureau, rel. April 29, 2013) ("*Bureau Confidentiality Order*").

³ See 47 C.F.R. § 0.459(d)(3) ("The information will be accorded confidential treatment ... until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.").

As discussed above, the Lifeline wireless service market is highly competitive in Massachusetts. Information on the number of subscribers that Nexus has and the number of subscribers that it has lost is extremely sensitive commercial information that would not normally be made available by a competitive business. Revealing how many subscribers Nexus has in other states will allow its competitors to see the precise degree to which the Company's unique marketing and related efforts have been successful and aid competitors in developing their own marketing plans, including whether and when to copy Nexus. Subscriber count information also enables Nexus' competitors to estimate Nexus' revenues for specific product families and particular subscribers, again to the competitive detriment of Nexus. Fenker Affidavit at ¶ 13.

Similarly, subscriber de-enrollment information is also highly sensitive commercial information. The number of subscribers de-enrolled for non-response and loss of eligibility is valuable to Nexus' competitors regarding the targeting of market segments most responsive to Nexus' offerings. Fenker Affidavit at ¶ 14.

Nexus believes that the reasoning of the *Bureau Confidentiality Order* is flawed. For example, the fact that Nexus' competitors did not elect to seek confidential treatment is in no way dispositive of Nexus' request and in no way eliminates competitive harm that disclosure would cause Nexus. Accordingly, Nexus is preparing an appeal of the Bureau ruling for consideration by the full Commission. If the Department were to publicly disclose Nexus' response to Record Request 8 during the pendency of the FCC appeal process, it would nullify Nexus' right to appeal the Bureau decision. The question of the confidential status of FCC Form 555 data is squarely before the FCC, and Nexus respectfully submits that the Department should

maintain the confidential status of this information until the FCC appeal process has been completed.

Nexus has provided Department the essential data from its FCC Form 555 filing in response to Record Request 8. Accordingly, the Department can use and consider this information for its investigation of Nexus' Amended Application. The issue for purposes of this Motion is whether the Department should make this information available to the public, including – most significantly – to Nexus' competitors. Nexus submits that there is little, if any, offsetting public benefit to be gained from requiring *public disclosure* of this information, and any benefit would be outweighed by the competitive harm that Nexus would suffer as a result of public disclosure. The Department's legitimate need to investigate Nexus' application for ETC designation and the legitimate interests of the Company in keeping its private state-specific subscriber and de-enrollment information confidential can effectively be balanced by granting a protective order with regard to the requested information.

B. Responses to Record Request 10 and Record Request 11

Record Request 10 asks Nexus to explain “the reason(s) for the change in the number of subscribers from 2011 to 2012” and “the reason(s) for the change in Nexus' wireless Lifeline revenue from 2011 to 2012.” The subscriber count information is contained in the confidential response to Information Request D.T.C. 2-5(b) and 2-5(c), which requested Nexus' subscriber counts.

Record Request 11 refers to the confidential responses to D.T.C. 2-5(c) and 2-5(e) and asks Nexus to “explain the change in the number of non-Lifeline wireline subscribers in relation to the change in annual revenues from non-Lifeline wireline subscribers from 2011 to 2012.”

1. The Requested Information is Confidential Information

An analysis and explanation of the reasons for the change in the number of subscribers and revenues from 2011 to 2012 is highly confidential and commercially sensitive information. This type of analysis is internal to Nexus, not made public and only available internally on a very limited, need-to-know basis. The development of this response reflects internal work that cannot be replicated by third parties through the analysis of public data. Fenker Affidavit at ¶ 17. Just as the information provided in response to Information Requests D.T.C. 2-5(b), 2-5(c) and 2-5(e) is confidential, so are the explanations regarding this confidential information.⁴

2. Nexus Would Suffer Serious Competitive Harm if the Requested Information Were Subject to Public Disclosure

The evaluation of the reasons for the change in the number of subscribers and revenues over time is a highly confidential internal analysis of private company operations. This evaluation would be of tremendous value to Nexus' actual and potential competitors because it would provide them with direct insight into the causes for changes in the number of Nexus' Lifeline subscribers. Further', it would provide Nexus' competitors with insight into the effectiveness of Nexus' overall business strategies, including its marketing efforts, recertification procedures, subscriber retention practices, growth rates and future financial capabilities. Fenker Affidavit at ¶ 18.

The requested information also includes analysis of Nexus' revenues. In past cases, the Department has ruled that the financial records of a private company such as Nexus should be accorded confidential treatment. *See, e.g., Budget Prepay, Inc.*, D.T.C. 11-12 (2012) at 8-9, 11 and 16 (Hearing Officer Order). Nexus respectfully submits that managerial analysis and first-hand insight into its internal financial information should be granted the same protection.⁵

⁴ Nexus *Motion for Protective Order* dated March 11, 2013.

⁵ *See* note 2, *supra*.

III. THE COMPANY'S REQUEST FOR CONFIDENTIAL PROTECTION IS PROPERLY LIMITED

The private company information for which a protective order has been requested is limited. Nexus has sought protection only regarding proprietary, confidential and competitively sensitive information. G.L. c. 25C, § 5. Therefore, the third standard applied by the Department is satisfied with respect to each of the above requests. Nexus has properly sought protection for only information it believes in good faith to be confidential in nature. Fenker Affidavit at ¶ 19. In addition, the Company has requested a limited, five-year period of protection, subject to its right to extend the period based upon a demonstrated future justification, which is consistent with Department precedent. *See, e.g., CoxCom, Inc., d/b/a Cox Communications*, D.T.C. 08-8 (June 23, 2009) (Order on Motion for Protective Order). A five-year period of protection is appropriate because of existing and expected levels of competition among wireless ETCs providing Lifeline-supported services in the future. Fenker Affidavit at ¶ 20.

IV. THE DEPARTMENT'S PROTECTIVE ORDER SHOULD CONTAIN CONTINUING SAFEGUARDS FOR PROTECTING THE SECRECY OF CONFIDENTIAL INFORMATION

The Department should adopt a protective order in this matter to: (1) classify the information provided under seal as exempt from public disclosure under G.L. c. 25C, § 5; (2) include specific safeguards against public disclosure of this information; and (3) provide an opportunity to Nexus to seek an extension of confidential treatment of this information at the end of a five year period of confidentiality.

The Department should make findings and rulings to confirm that the information provided by Nexus is confidential information that shall be exempt from public disclosure pursuant to G.L. c. 25C, § 5. Next, the Department should explain how it maintains the confidentiality of information accorded confidential treatment as part of its order. Finally, the

Department's order should provide that the Nexus confidential information will be accorded confidential treatment for five years from the date of its production, with an opportunity given to Nexus to seek an extension of the period of confidentiality based upon a showing of need for continuing protection against public disclosure. Such relief is consistent with past Department orders.⁶

Nexus respectfully requests that in its grant of protection in this matter, the Department include a requirement for the Department to send notice to the Company after it receives any third party request for disclosure of its confidential information, an opportunity to contest such a request and a notice of the Department's initial decision. Given that the third party requester may appeal the Department's denial of its request, Nexus has a strong interest in being aware of any attempts to force public disclosure of what it regards as confidential, proprietary and competitively sensitive information that has been protected by the Department from public disclosure, as well as the opportunity to contest any such request.⁷

⁶ The Department has adopted measures to enable an affected party to seek a further protection of confidential information in instances where the Department has accorded confidential treatment for a period of years and not in perpetuity. *In Re Verizon New England, Inc., d/b/a Verizon Massachusetts*, D.T.E. 01-31-Phase I (Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment), the Department granted confidentiality of information for two years, but provided that after that time, Verizon would have the opportunity to move the Department to further extend such protection accompanied by adequate proof of the need to do so. *See also, T-Mobile Northeast, LLC*, D.T.C. 12-4 (2012) at 8-9 (granting five years of protection).

⁷ Nexus notes that in protective agreements filed by parties in adjudicatory proceedings, it is commonly provided that in the event that the Department rules that information provided as confidential, but subject to reclassification by the Department at the request of a party, should be made public, the producing party is afforded a reasonable period of time to seek judicial protection against public disclosure before public disclosure is made by the Department. The Department has adopted this approach when asked to do so in granting motions for protective orders.

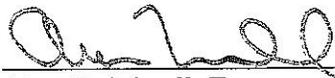
CONCLUSION

For the reasons above, based upon the information provided under seal and supporting affidavits, the Department should treat the referenced confidential information not subject to public disclosure, in accordance with G.L. c. 25C, § 5, and adopt the protective order terms requested by Nexus.

Respectfully submitted.

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By its attorneys.



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