

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. *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 that have been considered competitively sensitive and accorded confidential treatment, upon a proper showing by the producing party, are not only business contracts such as the Wholesale Agreement,¹ but also more generally, 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.

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

¹ *Budget Prepay, Inc.*, D.T.C. 11-12 (2012) at 16-17 (Hearing Officer Order).

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 response of Nexus to the Department's information request provided under seal meets 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 DOCUMENT PROVIDED BY NEXUS UNDER SEAL IS ENTITLED TO CONFIDENTIAL TREATMENT

As an initial matter and 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, 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. Indeed, the public does not get special rights in otherwise private data regarding a service simply because it (through the Federal Communications Commission) pays for the service.²

² *See Sorenson Communications v. FCC*, 567 F.3d 1215, 1225-26 (10th Cir. 2009) (First Amendment bars restrictions on use of customer specific data from video relay service even though it is funded by the universal service program)

A. The Requested Document is Confidential

As discussed above, Information Request D.T.C. 1-11(B) asks Nexus to provide the Department its Agreement with Verizon Wireless.³ This is a confidential document.

Each page of the Wholesale Agreement is labeled “Proprietary & Confidential” and the section of the Agreement labeled “Proprietary and Confidential Information” specifies that the Agreement itself is considered to be confidential information, and that it may not be disclosed to third parties (except legal, accounting or other professional representatives legally bound to maintain its confidentiality). Fenker Affidavit at ¶ 9. Accordingly, Nexus has consistently kept the Wholesale Agreement confidential to the extent permissible under state and federal law and, to Nexus’ knowledge, the Wholesale Agreement has not been publicly disclosed. Nexus limits access to this information internally and only provides this document to its attorneys and advisors on a need-to-know basis. This document is maintained internally on a secure basis. Fenker Affidavit at ¶ 10.

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

As discussed above, the Lifeline wireless service market already is highly competitive in Massachusetts, and is becoming increasingly more so. It should be emphasized at the outset that Nexus’ relationship with Verizon Wireless is Nexus’ most critical business relationship because Nexus relies on a single underlying carrier to deliver wireless service. Moreover, potential

³ The Wholesale Agreement gives Verizon Wireless considerable discretion to challenge disclosure of the Wholesale Agreement in situations such as this, where it has been requested by a governmental authority. Rather than challenge its disclosure, Verizon Wireless has requested that certain sensitive portions of the Wholesale Agreement be redacted prior to submission to an *in camera* inspection and filing with the Department. Fenker Affidavit at ¶ 11. Consistent with the recent Hearing Officer Ruling in the Budget PrePay ETC application docket, Nexus submits that the unredacted portions of the Wholesale Agreement contain confidential information. See *Budget PrePay, Inc.*, D.T.C. 11-12 at 16 (Dec. 19, 2012) (Hearing Officer Order) (“Budget provides redacted versions of the resale contracts with its underlying service providers [Verizon Wireless and Sprint].”).

competitive harms described below are magnified because the Wholesale Agreement covers every state in which Nexus provides wireless Lifeline services. Fenker Affidavit at ¶ 12.

The Wholesale Agreement sets forth, in detail, virtually every aspect of the business relationship between Nexus and Verizon Wireless, including, for example, Nexus' cost of service delivery, the process by which Nexus provisions wireless service to its subscribers, various policies and procedures, and other critical terms and conditions. Fenker Affidavit at ¶ 13. All of this is extremely sensitive commercial information that would not normally be made available to the public or to Nexus' competitors. Fenker Affidavit at ¶ 14. For example, revealing Nexus' underlying cost of wireless service would give its competitors an unfair advantage when devising and pricing their Lifeline service plans, to the competitive detriment of Nexus. Fenker Affidavit at ¶ 15. Indeed, many terms of the Wholesale Agreement deal with pricing, the calculation of charges, and items reflecting a cost impact on Nexus. In the same manner that financial statements are protected, the Department should accord protection to a document that would reveal critical elements of Nexus' cost structure, which could be used by its competitors to devise pricing, service and marketing plans. Fenker Affidavit at ¶ 16. The DTC has previously ruled that disclosure of cost structure would expose a company to competitive disadvantage because the information can be used to formulate competing marketing strategies and pricing offers. *See Cox Communications*, DTC 08-8 (Hearing Officer Ruling; June 23, 2009).

In circumstances virtually identical to these, the Department recently afforded confidential treatment to two wholesale agreements of another wireless Lifeline service provider. Specifically, on December 19, 2012, the Hearing Examiner ruled that Budget PrePay's redacted resale contracts in effect with Verizon Wireless and Sprint were entitled to confidential treatment

because “they each contain proprietary information.” *See Petition of Budget PrePay, Inc. for Limited Designation as a Lifeline-only Eligible Telecommunications Carrier*, D.T.C. 11-12 at 17 (Dec. 19, 2012) (Hearing Officer Ruling). The Hearing Examiner agreed with Budget PrePay’s assertion that the “contracts contain detailed information about [Budget PrePay’s] relationships with its underlying service providers and that disclosure of that information could harm [Budget PrePay’s] business position.” *Id.* at 16.

In addition, Nexus believes that public disclosure also would cause significant competitive harm to Verizon Wireless. For example, disclosure of its pricing, policies and terms and conditions afforded Nexus would impair the ability of Verizon Wireless to negotiate reseller agreements with other parties. Moreover, public disclosure would give Verizon Wireless’ competitors – other wireless wholesale service providers – unfair insight into Verizon Wireless’ pricing and practices with respect to resellers, thereby causing it additional competitive harm.⁴ Fenker Affidavit at ¶ 17.

Nexus submits that there is little, if any, offsetting public benefit to be gained from requiring *public disclosure* of this document, 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 Wholesale Agreement confidential can effectively be balanced by granting a protective order with regard to the requested document.

⁴ The Department has previously found that competitive harm to third parties is relevant for purposes of its consideration of confidentiality requests. *See, e.g., Cox Communications*, D.T.C. 07-10 (Hearing Officer Ruling; May 8, 2008).

III. NEXUS' 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 ¶ 18. 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 (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 ¶ 19.

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.⁵

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.⁶

CONCLUSION

For the reasons above, based upon the document provided under seal and supporting affidavit, the Department should treat the referenced confidential document not subject to public

⁵ 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's 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 based on T-Mobile's projection of when the confidential information will no longer be competitively sensitive).

⁶ 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.

disclosure, in accordance with G.L. c. 25C, § 5, and adopt the protective order terms requested by Nexus.

Respectfully submitted,

NEXUS COMMUNICATIONS, INC.

By its attorneys,



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Dated: July 3, 2013

9. Each page of the Wholesale Agreement is labeled “Proprietary & Confidential” and the section of the Agreement labeled “Proprietary and Confidential Information” specifies that the Agreement itself is considered to be confidential information, and that it may not be disclosed to third parties (except legal, accounting or other professional representatives legally bound to maintain its confidentiality).
10. Nexus has consistently kept the Wholesale Agreement confidential to the extent permissible under state and federal law and, to my knowledge, the Wholesale Agreement has not been publicly disclosed. Nexus limits access to this information internally and only provides this document to its attorneys and advisors on a need-to-know basis. This document is maintained internally on a secure basis.
11. The Wholesale Agreement gives Verizon Wireless considerable discretion to challenge disclosure of the Wholesale Agreement in situations such as this, where it has been requested by a governmental authority. Rather than challenge its disclosure, Verizon Wireless has requested that certain sensitive portions of the Wholesale Agreement be redacted prior to submission to an *in camera* inspection and filing with the Department.
12. As previously noted, the Lifeline wireless service market already is highly competitive in Massachusetts, and is becoming increasingly more so. I believe Nexus’ relationship with Verizon Wireless is Nexus’ most critical business relationship because Nexus relies on a single underlying carrier to deliver wireless service. Moreover, the potential competitive harms that I will describe below are magnified because the Wholesale Agreement covers every state in which Nexus provides wireless Lifeline services.
13. The Wholesale Agreement sets forth, in detail, virtually every aspect of the business relationship between Nexus and Verizon Wireless, including, for example, Nexus’ cost of service delivery, the process by which Nexus provisions wireless service to its subscribers, various policies and procedures, and other critical terms and conditions.
14. All of the information described in the previous paragraph is extremely sensitive commercial information that would not normally be made available to the public or to Nexus’ competitors.
15. Revealing Nexus’ underlying cost of wireless service would give its competitors an unfair advantage when devising and pricing their Lifeline service plans, to the competitive detriment of Nexus.
16. Many terms of the Wholesale Agreement deal with pricing, the calculation of charges, and items reflecting a cost impact on Nexus. I believe it is appropriate for the Department to accord protection to a document that would reveal critical elements of Nexus’ cost structure, which could be used by its competitors to devise pricing, service and marketing plans.

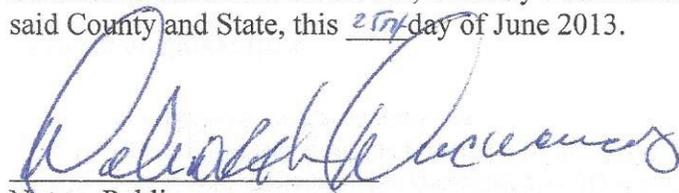
17. I believe public disclosure of the Wholesale Agreement also would cause significant competitive harm to Verizon Wireless. For example, I believe disclosure of Verizon Wireless' pricing, policies and terms and conditions afforded Nexus would impair the ability of Verizon Wireless to negotiate reseller agreements with other parties. Moreover, public disclosure would give Verizon Wireless' competitors – other wireless wholesale service providers – unfair insight into Verizon Wireless' pricing and practices with respect to resellers, thereby causing it additional competitive harm.
18. Nexus has properly sought protection for only information it believes in good faith to be confidential in nature.
19. 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.

Signed under the pains and penalties of perjury at Columbus, Ohio on this 25 day of June
2013.


Steven Fenker
President
Nexus Communications, Inc.

State of Ohio
Franklin County

Subscribed and sworn before me, a Notary Public in and for
said County and State, this 25th day of June 2013.


Notary Public
My Commission Expires on: 3/10/2014
(Seal)