

February 4, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

**Re: Request for Confidential Treatment of Exhibits to February 4, 2011 Ex Parte Filing
in WC Dockets 09-197 and 03-109**

Dear Ms. Dortch:

Pursuant to Sections 0.457 and 0.459 of the Commission's rules, Nexus Communications, Inc. ("Nexus") hereby requests confidential treatment of three exhibits to the ex parte being filed concurrently with this request.¹ The confidential exhibits are in the enclosed envelope marked "Confidential—Not for Public Inspection." Specifically, Nexus requests that this information be withheld from routine public inspection, as the information is of an extremely commercially-sensitive nature, contains trade secrets, and Nexus has never made this information public. The confidential exhibits have been clearly marked on each page "CONFIDENTIAL—NOT FOR PUBLIC INSPECTION" in the upper right hand corner, as instructed on the Secretary's web page.

Section 0.457(d) of the Commission's rules already provides that this information is automatically protected under the Commission's confidentiality procedures because it contains trade secret information² Section 0.457 of the Commission's rules, which requires that the Commission treat as confidential documents that contain "trade secrets and commercial or financial information . . . not routinely available for public inspection."

As you are aware, these Commission regulations implement and incorporate exemptions from the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18

¹ 47 C.F.R. § 0.457(d), 0.459.

² 47 C.F.R. § 0.459(a) ("If the materials are specifically listed in § 0.457, such a request is unnecessary.").

U.S.C. § 1905. See 47 C.F.R. § 0.457(d). Under these exemptions, information is exempt from public disclosure if it is (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential in nature. 5 U.S.C. § 552(b)(4). The information being provided by Nexus is exempt from public disclosure under the aforementioned exemptions and the FCC's regulations because it constitutes commercial and financial information, obtained from a person, which is confidential in nature.³

Similarly, Section 1905 of Title 18 of the United States Code makes it unlawful for federal government agencies or employees to disclose information relating to "the trade secrets, processes, operations, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation, or association...." Information that is exempt from release under Exemption 4 of the FOIA is prohibited from being disclosed, under 18 U.S.C. § 1905, unless disclosure is "authorized by law" by another statute other than FOIA.⁴ Because no other statute authorizes the release of the information at issue here, disclosure of the Documents is prohibited by the criminal provisions of 18 U.S.C. § 1905.⁵

Nevertheless, out of an abundance of caution, Nexus is also making a showing that the information would also qualify for protection pursuant to Commission rule 0.459.⁶ As required in rule 0.459, Nexus is providing below a statement of the reasons for withholding the information marked confidential, as well as a statement of facts underlying the information.

In the enclosed confidential exhibits to Nexus' ex parte filing, Nexus is voluntarily providing Wireline Competition Bureau ("WCB") staff with information regarding Nexus' facilities used to provide services supported by federal Low Income universal service funding, as well as specific information regarding the number and type of subscribers that have paid Nexus' service activation fee ("SAF"). This information is provided at the request of WCB staff for the sole purpose of assisting staff to better understand Nexus' operations. Staff's request is in furtherance of its discussions with Nexus during its January 11, 2011 ex parte meeting.

³ Under Exemption 4 of the FOIA, the terms "commercial" and "financial" are to be given their "ordinary meaning," and thus include information in which a submitter has a "commercial interest" *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); accord, *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974), cert denied, 421 U.S. 963 (1975). "Commercial interest" has been interpreted broadly to include anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). The term "person," for FOIA purposes, includes entities such as Nexus. See, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 871 n.15 (D.C. Cir. 1987) ("For FOIA purposes a person may be a partnership, corporation, association, or public or private organization other than an agency.").

⁴ See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (Exemption 4 and 18 U.S.C. § 1905 are "coextensive" and § 1905 prohibits the disclosure of confidential business information unless release is authorized by a federal statute other than FOIA); see also 47 C.F.R. § 0.457(d).

⁵ See *CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987).

⁶ 47 C.F.R. § 0.459.

Up to now, Nexus has only provided information regarding its facilities when absolutely necessary for state public utility commission review of its applications for ETC designation. In each and every instance, Nexus requested and received confidential treatment from the state commissions. Moreover, Nexus has never released any specific information regarding the number of subscribers who have paid SAFs. Nexus has guarded these filings and data from public inspection because the information at issue is highly commercially-sensitive and contains trade secrets that would cause Nexus substantial competitive harm if its competitors were to gain access. Nexus operates in the highly competitive Low Income-only Eligible Telecommunications Carrier ("ETC") market and revealing its specific facilities arrangements would potentially provide a competitive advantage to Nexus' competitors.

If upon review of this request, the Commission decides not to grant this request, Nexus requests that the Commission refrain from opening the enclosed envelope containing the confidential materials and immediately contact the undersigned counsel who will retrieve the confidential materials as soon as possible.

(1) Identification of the specific information for which confidential treatment is sought;

Nexus seeks to withhold from public inspection and otherwise seeks confidential treatment of the information contained in the enclosed filing being provided in a separate envelope, and marked on each page with "CONFIDENTIAL—NOT FOR PUBLIC INSPECTION."

This information contains very specific, detailed, and technical information regarding the telecommunications facilities (e.g., electronic equipment and communications transport lines) used by Nexus to provide its services to customers, including customers receiving federal Low Income funding. As a condition of its receiving this Low Income funding, Nexus abides by the obligations of Section 214(e) of the Act and the Commission's orders, which set forth specific requirements regarding the type and nature of facilities that ETCs must use to provide specific services.⁷ The enclosed filing explains, in great detail, precisely how Nexus has arranged its facilities and otherwise complies with this facilities requirement.

Additionally, Nexus has given the number of customers who have paid its SAF, including subsets of that count based on service features and payment practices.

⁷ 47 U.S.C. § 214(e).

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

As discussed above, Nexus is voluntarily providing WCB staff with information regarding Nexus' facilities used to provide services for which its end users are provided a discount that is subsequently reimbursed by the federal Low Income universal service fund program. This information is provided at the request of WCB staff for the sole purpose of assisting staff to better understand Nexus' operations. Staff's request is in furtherance of its discussions with Nexus during its January 11, 2011 ex parte meeting.

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

The description of Nexus' facilities arrangements is highly confidential and proprietary information and constitutes a trade secret. Nexus is providing staff with very detailed information about the specific type and location of the facilities it uses to provide the supported services. It is also providing specific customer counts based on the customer's payment history and practices. Nexus' position in the very competitive Low Income-only ETC market would be substantially compromised if its competitors were to gain access to this information.

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

The market of serving consumers who qualify for federal and state Low Income funding is highly competitive. The number of new ETCs has steadily increased over the past few years, and there has been a recent uptick in new entrants seeking to quickly learn as much as they can about how they might successfully serve this population as Nexus has done, including the specific facilities it has deployed and its level of success with respect to its SAF policies.

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

Disclosure of this information to Nexus' competitors would permit these entities to gain a significant competitive advantage over Nexus, possibly by copying key aspects of Nexus' business plans and operations. The arrangement of facilities used by ETCs serving the participants in the Low Income program can vary significantly from ETC to ETC. The choice of which of the nine supported services an ETC will provide to its customers over its own facilities, or over resold facilities, may also vary greatly, as can specific routing and transmission arrangements. Competitors who gain access to Nexus' confidential information could copy its business plans and technical facilities arrangements, or might otherwise seek to misrepresent this information to the disadvantage of Nexus. Competitors who learn the extent to which Nexus has, or has not, been successful in getting customers to pay various levels of monetary amounts in connection with its SAF would be a significant advantage to Nexus' competitors, who, like Nexus, operate on very competitive profit margins.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

Nexus has consistently sought to keep its confidential information from being publicly disclosed, and has only shared this information with its attorneys, consultants, and certain state public utility commissions when it was required to do so during ETC application proceedings. In each case, the information was subject to confidentiality protections, such as attorney-client privilege or the state confidentiality procedures. With respect to the specific information regarding the number of subscribers who have paid SAFs, Nexus has never divulged this information without seeking and obtaining confidentiality protection.

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

To Nexus' knowledge, this information has never been made available to or otherwise disclosed to the public. Other than disclosure to attorneys, consultants, and state public utility commissions subject to the confidentiality protections described in response number 6 above, Nexus has not disclosed this information to any third parties or made it available in any other manner. With respect to the specific information regarding the number of subscribers who have paid SAFs, Nexus has never divulged this information without seeking and obtaining confidentiality protection.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

Nexus does not foresee a determinable date or timeframe after which it will no longer consider this information highly confidential, commercially-sensitive trade secret information.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Nexus is voluntarily submitting this information in order to provide WCB staff with information they believe would be helpful as they consider policy questions regarding the future direction of the Low Income program. Nexus is working with staff in a good faith attempt to be proactive in the policy debates regarding the program. There is absolutely no requirement, formal or otherwise, that Nexus provide this information, or that it provide staff with the level of detail that it has in the enclosed filing. Public disclosure of this information would severely undermine Commission staff's ability to gather such information from regulated entities under voluntary arrangements.

Marlene H. Dortch
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Respectfully submitted,

A handwritten signature in cursive script that reads "Danielle Frappier". The signature is written in black ink and is positioned above the printed name.

Danielle Frappier

cc: Vickie Robinson
Kimberly Scardino
Nicholas Degani