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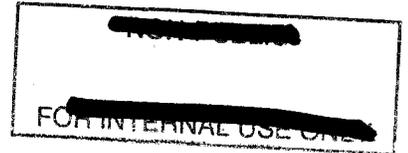
FILED/ACCEPTED

BY HAND DELIVERY

JUN 17 2013

June 17, 2013

Federal Communications Commission
Office of the Secretary



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

Re: In re Request for Confidential Treatment of Nexus Communications, Inc.
Filing of FCC Form 555 – WC Docket No. 11-42

Dear Secretary Dortch:

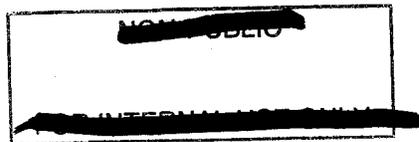
Enclosed for filing in the above-captioned docket are an original and four (4) copies of Nexus Communications, Inc.'s Reply to Opposition to Application for Review. Please acknowledge receipt of this document by date-stamping the "Stamp & Return" copy.

Thank you for your attention to this matter. Please contact the undersigned should you have any questions.

Respectfully submitted,

Danielle Frappier

Enclosures



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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

FILED/ACCEPTED

JUN 17 2013

Federal Communications Commission
Office of the Secretary

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

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115(d), Nexus Communications, Inc. (“Nexus”) respectfully submits this Reply to the Joint Answer of the National Association of State Utility Consumer Advocates and National Consumer Law Center (“Respondents”) in Opposition to Nexus’ Application for Review (“Opp.”).¹

I. Effective Regulation of the Lifeline Program Depends On Competition.

Respondents claim that Nexus’ concern about harm from disclosure of its subscriber count and de-enrollment data is “divorced from the federal universal service regulatory framework.” They apparently think that Lifeline’s status as a government benefit program means the Commission should not recognize Lifeline as competitive. Opp. at 4-5. But competition is a key component of the Lifeline program, as a matter of affirmative federal policy.² The Lifeline program *relies on* competition to ensure “consumers receive quality services at ‘just, reasonable, and affordable rates.’”³ To that end, the FCC has approved compliance plans for more than twenty wireless ETCs, and dozens of additional compliance plans await approval. Respondents

¹ Respondents did not serve Nexus or file a proof of service, in violation of 47 C.F.R. §§ 115(f), 1.47(g) (Nexus found it online), so the Commission should disregard the Opposition. In fact, Respondents are not even proper participants in this proceeding. See 47 C.F.R. § 0.459(i).

² See, e.g., *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, 6732 (rel. Feb. 6, 2012) (“*Lifeline Reform Order*”) at ¶ 173; see also *Federal-State Joint Bd. on Universal Service*, Recommendation Decision, 12 FCC Rcd. 87, 302 (rel. Nov. 8, 1996) at ¶ 423.

³ See, e.g., *Lifeline Reform Order*, 27 FCC Rcd. at ¶¶ 317; 371.

ignore the fact that competing ETCs will necessarily generate competitively sensitive data. Seeking to protect it is not “divorced from” the “regulatory framework;” it is entirely consistent with the Commission’s affirmative policy of relying on competition to make the program work.⁴

Respondents also claim that “competition ... will not guarantee that ... Lifeline funds are well allocated,” so the public must have access to ETCs’ competitively sensitive data to “assure” that the program “continues to assist ... eligible consumers and promote universal service.” Opp. at 5. This is a *non sequitur*. Even if competition alone will not assure Lifeline funds are “well-allocated,” revealing competitively sensitive data will hinder, not advance, that goal. *Additional* regulatory steps may also be needed (*e.g.*, customer certification rules), but that does not justify revealing Nexus’ confidential, competitively sensitive information.⁵

II. Protecting Confidential Data Does Not Undermine Public Review.

Respondents argue that the public should have access to Nexus’ Form 555 data because “Lifeline service ... depends on ... public funds ... to cover all or a portion of the cost” of ETCs’ services. Opp. at 5. But “the public” – via the Commission – has decided that competition is the best way to ensure that the goals of the program are met. A necessary by-product is that ETCs in this hyper-competitive environment develop highly sensitive data that, if revealed, would provide competitors with knowledge of business plans and evidence of what worked and did not

⁴ The public does not get special rights in otherwise private data regarding a service simply because it (through the Commission) pays for the service. *Sorenson Communications v. FCC*, 567 F.3d 1215, 1225-26 (10th Cir. 2009) (1st Amendment bars restrictions on use of customer-specific data from video relay service even though it is funded by the universal service program).

⁵ Respondents cite the Bureau’s Order to claim that “the FCC developed the Form 555 Report with an expectation that the information reported would not be confidential.” Opp. at 8. However, the Order simply notes that the Commission did not intend Form 555 to request confidential data, and that ETCs “could request confidential treatment under ... the Commission’s rules” if need be – which is exactly what Nexus has done. *Request for Confidential Treatment of Nexus Communications, Inc. Filing of FCC Form 555*, Order, WC Docket No. 11-42 (rel. April 29, 2013) (“Order”), at ¶ 3.

work in the market. As a result, *protecting* sensitive data, not releasing it, is necessarily part of what “the public” *must* do to support the program. State and federal regulators are the public’s surrogates here, and Nexus gives *them* detailed confidential data.⁶ But Nexus does not want to be forced to *also* give its numerous *competitors* that data.⁷

III. The Only Evidence in the Record Supports Granting Nexus’ Request.

Respondents claim that Nexus has not shown by a “preponderance of the evidence” that disclosure of its Form 555 data is likely to cause substantial competitive harm. Opp. at 6, 11. Respondents, however, ignore Nexus’ evidence showing how rivals may use Form 555 data to gain a competitive advantage, both directly and by using the data to mine additional confidential information about Nexus’ operations. See App. at 10-14, 16-19. Nexus showed that it is a privately held firm based in Columbus, Ohio, that competes directly against large, sophisticated, multi-national, publicly traded firms to provide the highest quality services to the finite number of Lifeline-qualified subscribers. Nexus’ competitors use all publicly available data to find the

⁶ Respondents fail to explain how access to Nexus’ detailed competitive data would assist in public review of the program. For example, while they claim that the public must help ensure that ETCs advertise their services and explain service eligibility rules, Opp. at 3-4, they do not and cannot draw any connection between achieving those goals and revealing Nexus’ state-specific subscriber count and de-enrollment data. Respondents also never explain why limiting public disclosure to aggregate rather than ETC-specific data would not meet their concerns.

⁷ Nexus supports the continued enrollment of qualified applicants, in person, at “brick and mortar” locations. Respondents claim that Nexus’ support for banning enrollments at temporary locations such as tents and out of the trunks of cars, and for implementation of the National Lifeline Accountability Database (“NLAD”), undermines Nexus’ claim that its Form 555 data is confidential. Opp. at 4-5. Nexus’ support for face-to-face enrollment from “brick and mortar” locations arises from concerns about compliance with program rules by third-party agents at temporary locations; it does not relate to subscriber or de-enrollment counts. Moreover, the Commission’s requirements for the NLAD affirmatively recognize competitive concerns: the database “must have sufficient protections so that all the data housed in [it] may only be used to perform the functions ... described in this Order [e.g., prevent duplicate subscriptions] and may not be used for any other purpose, *including marketing or subscriber retention.*” *Lifeline Reform Order*, 27 FCC Rcd. at 6751-52 ¶ 220 (emphasis added).

best way to successfully compete for the finite Lifeline subscriber base, including using any available sensitive competitive data to gain advantages over rivals. A key aspect of ETCs' market strategy is determining which Lifeline outreach and distribution efforts work and which fail at the critical task of reaching potential Lifeline-qualified applicants. These facts constitute more than sufficient evidence to show that Nexus will be harmed by releasing its confidential data. Respondents, in contrast, fail to introduce any new evidence into the record and merely restate the bald conclusions in the Order that: (1) Nexus' state subscriber count information is "essentially" publicly available on USAC's website; and (2) the competitive sensitivity of Nexus' Form 555 data is questionable because other ETCs have publicly filed that same data. Opp. at 9-11. Nexus, however, has shown why these claims are wrong.⁸

Respondents argue that the public filing of Nexus' Iowa-specific Form 555 with the Iowa Utilities Board belies Nexus' claim that the data is confidential. Opp. at 10. The fact that Nexus was *compelled* to publicly file its Form 555 in one state based on that state's laws only illustrates that Nexus has consistently treated the data as confidential and sought to prevent its public disclosure. Indeed, other state commissions have recognized the competitive sensitivity of the data.⁹ One adverse decision in Iowa does not waive Nexus' right to seek confidential treatment in jurisdictions where public disclosure of Form 555 is not explicitly required by law.

⁸ See App. at 7-10 (subscriber count data *not* available on website); *id.* at 14-16 (Nexus cannot be forced to endure competitive injury based on its rivals' failure to seek protection of Form 555 data) Nexus explained that the standard for assessing "competitive injury" is not how other ETCs treat their data, but rather whether other ETCs may *use* Nexus' data to their competitive advantage. App. at 16. Respondents present no evidence at all – none – to rebut Nexus' clear showing that its rivals may use its Form 555 data to obtain a competitive advantage.

⁹ See, e.g., *Lifeline Eligible Telecommunications Carrier Certification Reports. Filed in Conformance with FCC Order No. 12-11 (Lifeline and Link Up Reform and Modernization)*, Order, S.C. Pub. Serv. Comm'n, Docket 2013-48-C (April 10, 2013) ("The information contained in [Nexus'] FCC Form 555 is proprietary and is entitled to protection under the South Carolina Freedom of Information Act").

Respondents' argument amounts to the claim that a decision by one state to deny confidentiality automatically preempts any contrary decision by any other state or by this Commission. Respondents provide no legal support for this outlandish conclusion, because there is none. Iowa's unfortunately erroneous approach to the question of confidentiality is not somehow magically binding throughout the entire country.¹⁰

For the reasons stated above and in Nexus' Application for Review, Nexus respectfully requests that the Commission reverse the Order and rule that Nexus' Form 555 filings for data year 2012 are confidential and will be withheld from public disclosure pursuant to 47 C.F.R. §§ 0.457 and 0.459, FOIA Exemption 4, and the Trade Secrets Act.

Respectfully submitted,

NEXUS COMMUNICATIONS, INC.

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Its Attorneys

June 17, 2013

¹⁰ Respondents' reliance on *Parkridge Hosp., Inc. v. Califano*, 625 F.2d 719 (6th Cir. 1980) is misplaced. *Parkridge* only addressed the question of when disclosure of information is "authorized by law" under the Trade Secrets Act, 18 U.S.C. § 1905. In that case, a regulation authorized disclosure of health care providers' Provider Cost Reports upon a written request, which constituted the specific required "authoriz[ation] by law." No Commission regulation "authorizes" disclosure of ETC confidential information on Form 555. To the contrary, as noted in footnote 4, *supra*, the Commission specifically contemplated that ETCs may seek confidential treatment for data submitted in Form 555, as Nexus has done here.

CERTIFICATE OF SERVICE

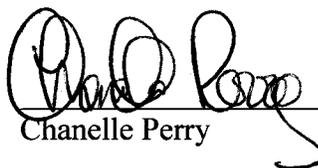
I, Chanelle Perry, a Paralegal in the law firm of Davis Wright Tremaine, LLP, hereby certify that on this 17th day of June, 2013, I caused a copy of the foregoing "**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**" to be served by hand upon:

Julie A. Veach
Chief, Wireline Competition Bureau
Federal Communications Commission
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Washington, DC 20554

and by U.S. Mail, First Class, postage prepaid, upon:

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