

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of 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

Adopted: February 8, 2000

Released: February 14, 2000

By the Commission:

I. INTRODUCTION

1. On January 23, 1998, Northeast Communications of Wisconsin, Inc. (“Northeast”) filed a request seeking non-disclosure of certain financial information submitted in support of its Local Multipoint Distribution Service (“LMDS”) short-form auction application (“FCC Form 175”).¹ The Auctions and Industry Analysis Division of the Wireless Telecommunications Bureau (“Auctions Division”) denied the request for confidential treatment in a Public Notice issued on January 27, 1998² and in a separate letter ruling, dated February 17, 1998. Northeast submitted an Application for Review (“Application”) on February 3, 1998.³ For the reasons described below, the Commission denies Northeast’s Application.

II. BACKGROUND

2. On September 27, 1997, the Commission announced an auction for 986 licenses to provide LMDS in the 28 GHz and 31 GHz bands. The Commission further announced that qualifying LMDS applicants would be eligible for bidding credits or discounts on their winning bids. Eligibility for the three levels of LMDS bidding credits depended on the annual gross revenues of the bidder and its controlling principals and affiliates, as averaged over the preceding three years. A bidder with gross

¹ See Letter from Timothy E. Welch, Hill & Welch to Matthew Moses, Auctions Division, Wireless Telecommunications Bureau, Federal Communications Commission (January 23, 1998) (“Confidentiality Request”).

² See *Public Notice*, DA 98-141 (rel. January 27, 1998), 13 FCC Rcd 2181.

³ Northeast also filed “Motion for Leave to File Supplement and Supplement to Application for Review--Confidentiality Request Denial” on February 23, 1998. In this filing Northeast seeks to bring to our attention the letter ruling below which denied the confidentiality request and to set forth additional bases in support of its Application. We hereby grant this Motion.

annual revenues of not more than \$15 million would receive a 45 percent bidding credit. A bidder with gross annual revenues of more than \$15 million, but not more than \$40 million would receive a 35 percent bidding credit, and a bidder with average gross annual revenues of more than \$40 million, but not more than \$75 million would receive a 25 percent bidding credit.⁴

3. Northeast submitted an FCC Form 175 application in which it sought a 35 percent bidding credit. As required by Commission rules, Northeast included an Exhibit C that listed the prior three years' gross revenues and an average of those gross revenues to support its claimed eligibility for a bidding credit.⁵ Northeast requested that this information be withheld from the public, as provided in Sections 0.457(d) and 0.459 of the Commission's Rules.⁶ Northeast argued that these financial data were entitled to confidentiality because: (1) it is a closely held corporation; (2) the financial information submitted was not related to determining whether Northeast was qualified to be a licensee; (3) the information is not of the type that Northeast would normally make available to the public; and (4) public release of the information would harm Northeast's position in the market place.

4. In ruling on Northeast's request, the Auctions Division noted that it considers confidentiality and non-disclosure requests on a case-by-case basis. Section 0.459 of the Commission's Rules requires an entity requesting confidential treatment of material to submit a statement of the reasons for withholding the materials from inspection and of the facts upon which those reasons are based. The Auctions Division noted that mere conclusory or generalized allegations cannot support a request for non-disclosure. Rather, the submissions must show by a preponderance of the evidence⁷ that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552 ("FOIA").⁸ Accordingly, the Auctions Division determined that Northeast's request failed to meet the requirements specified in Section 0.459⁹ of the Commission's Rules. The letter ruling also stated that the mere fact that Northeast is a privately held company does not justify withholding from inspection materials that bear upon its qualifications to participate in the LMDS auction as a "small business" eligible for a 35

⁴ See Auction of Local Multipoint Distribution Service, Auction Notice and Filing Requirements for 986 Basic Trading Area Licenses in the 28 GHz and 31 GHz Bands, Scheduled for December 10, 1997, *Public Notice*, DA 97-2081, 13 FCC Rcd 7754 at 7760 (1997); see also 47 C.F.R. §§ 101.1107 and 101.1112.

⁵ See 47 C.F.R. § 101.1109 (1997).

⁶ See 47 C.F.R. §§ 0.457 and 0.459. The Commission amended Section 0.459 after Northeast submitted its request and after the Auctions Division acted on the request. See *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, *Report and Order*, FCC 98-184, (rel. August 4, 1998) 13 FCC Rcd 24816. The amendments to Section 0.459 set forth with particularity the information that must be submitted to support a case for non-disclosure of information. This rule change has no impact on our decision since we base our decision on Northeast's decision to put its financial position in issue and public policy considerations in favor of full disclosure of whether an applicant for bidding credits has truthfully stated its case.

⁷ See 47 C.F.R. § 0.459(d).

⁸ See 5 U.S.C. § 552(b)(4) which states that the government need not disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

⁹ See 47 C.F.R. § 0.459(b) which states in part: "Each such request shall contain a statement of the reasons for withholding the materials from inspection . . . and of the facts upon which those reasons are based."

percent bidding credit.

III. DISCUSSION

5. Northeast alleges in its Application that the Auctions Division declined to grant the request for confidentiality because the information was required for filing under Section 101.1109(a)(2) of the Commission's Rules¹⁰ and that the Auctions Division did not take into account that Northeast's competitive position in the auction would be compromised if its financial position were made available to the public, including auction participants against whom Northeast would be bidding.¹¹ We disagree. As the Auctions Division correctly stated, Section 0.459 (b) of the Commission's Rules requires an entity requesting confidential treatment of material to submit a statement of the reasons for withholding the materials from inspection and the facts upon which those reasons are based.¹² Mere conclusory or generalized allegations cannot support a request for nondisclosure. This is particularly damaging to Northeast's case since the party claiming confidentiality bears the burden of proving by a preponderance of evidence that such treatment is appropriate.¹³

6. Even if a mere allegation of harm were sufficient under Section 0.457¹⁴ to present a *prima facie* case in support of confidential treatment, the Commission's Rules permit disclosure of materials for which confidential treatment is sought to the extent that policy considerations favoring disclosure outweigh those supporting non-disclosure. In seeking bidding credits based on its assertion that its average gross revenues for the preceding three years did not exceed a certain amount, Northeast placed in issue the very information which it sought to shield from public scrutiny. A fundamental necessity in the conduct of spectrum auctions is that the eligibility of applicants for any bidding credits and their suitability as licensees must be fully scrutinized. Indeed, fairness to the other participants in the auction requires that this financial information be accessible to the public. Competing bidders and the public in general have a compelling interest in having access to the information that is the subject of the confidentiality request because it bears directly on Northeast's eligibility for bidding credits.

7. Northeast errs in its Application when it cites *Bartholdi Cable Company, Inc. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997). This case actually supports the Commission's right to disclose financial information when public interest considerations in disclosure outweigh those in favor of confidentiality. In *Bartholdi*, the Commission found that the public had a compelling interest in the information at issue because it had a direct bearing on the applicant's qualifications as a licensee.

8. Accordingly, we conclude that the Auctions Division acted appropriately and was well within its authority in denying Northeast's request for confidentiality. We note that the Commission

¹⁰ See Application at 2.

¹¹ See *id.* at 4.

¹² See 47 C.F.R. § 0.459(b).

¹³ See 47 C.F.R. § 0.459(d).

¹⁴ See 47 C.F.R. § 0.457.

recently undertook a review and amendment of its rules concerning the treatment of confidential information submitted by prospective licensees.¹⁵ For example, in considering claims of confidentiality, trade secrets or sensitive financial information in the context of FOIA exemption No. 4, we have held that the Commission generally has released publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding¹⁶ or where the Commission has identified a compelling public interest in disclosure.¹⁷ Both of these criteria are clearly met: Northeast has placed its financial position in issue by asserting its eligibility for bidding credits and other bidders have an interest in knowing whether Northeast legitimately qualifies for bidding credits.

II. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, that Northeast's request filed with the Commission on February 3, 1998, seeking confidential treatment of its gross revenues is DENIED.

10. IT IS FURTHER ORDERED that the Motion for Leave to File Supplement and Supplement to Application for Review—Confidentiality Request Denial IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁵ See *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, *Report and Order*, FCC 98-184, (rel. August 4, 1998) 13 FCC Rcd 24816.

¹⁶ See, e.g., *The Western Union Telegraph Company*, 2 FCC Rcd 4485-4487 (1987) (citing *Kannapolis Television Co.*, 80 F.C.C. 2d 307 (1980))

¹⁷ See, e.g., *MCI Telecommunications Corp.*, 58 RR 2d 187, 190 (1985).