



Federal Communications Commission
Washington, D.C. 20554

August 15, 2003

DA 03-2681

E. Ashton Johnston, Esq.
Paul W. Jamieson, Esq.
Piper Rudnick
1200 19th Street, NW
Washington, D.C. 20036-2412

Re: Request for Confidentiality Pursuant to 47 C.F.R. § 0.459

Dear Messrs. Johnston and Jamieson:

Star Wireless LLC ("Star Wireless") requests¹ that the Commission grant confidential treatment, pursuant to Section 0.459 of the Commission's rules, of a disclosure it made to the Commission under the Commission's rules.² Specifically, Star Wireless requests that the information it provided in a letter to the Commission, dated September 6, 2002, be treated with confidentiality.³ For the reasons discussed below, we deny Star Wireless' request.

The Commission's confidentiality rule sets forth specific reasons for withholding materials from public inspection.⁴ Star Wireless fails to allege that the information contained in its letter is protected from disclosure by any of the exemptions identified in the confidentiality rule. For instance, Star Wireless does not claim that the information submitted to the Commission is "commercial or financial, or contains a trade secret or is privileged."⁵ Instead, Star Wireless speculates that disclosure of the information contained in its letter may result in abuse of the Commission's procedures⁶ by unnamed third

¹ Letter from E. Ashton Johnston and Paul W. Jamieson, Counsel to Star Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, September 6, 2002 ("Letter").

² 47 C.F.R. §§ 0.459.

³ See Letter.

⁴ 47 C.F.R. § 0.459. Section 0.457 sets forth the categories of records that are not routinely available for public inspection, *i.e.*, accorded confidential treatment, and Section 0.459 sets forth the procedures for submitting requests that material or information be withheld from public inspection. For instance, Section 0.459(b)(3) provides that a request for confidentiality shall, among other things, include an "explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged." 47 C.F.R. § 0.459(b)(3).

⁵ 47 C.F.R. § 0.459(b)(3).

⁶ The term "abuse of process" has been defined as "the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule." Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process, *First Report and Order*, 4 FCC Rcd. 4780, 4793 n.3 (1989); see *Silver Star Communications-Albany, Inc.*,

parties.⁷ Specifically, Star Wireless argues that other parties may use the information disclosed to oppose its participation in Commission proceedings or to challenge its status as (or qualification to be) a Commission licensee.⁸ Star Wireless' request fails to meet the requirements of Section 0.459 because Star Wireless does not explain how the information it disclosed to the Commission qualifies for confidential treatment within the standards set forth in the rule.⁹ Furthermore, Star Wireless' expressed concern that unnamed third parties may attempt to use certain information to Star Wireless' disadvantage is not a sufficient reason, by itself, for granting confidentiality. While Star Wireless claims to have taken steps to keep the information at issue confidential pursuant to Sections 0.459(b)(6) and (7), such measures do not cure the deficiency of failing to satisfy the other critical requirements of the confidentiality rule, including the need to explain the degree to which the information is a trade secret or is confidential business information.¹⁰ Accordingly, Star Wireless has failed to meet its burden under Section 0.459 to establish by a preponderance of the evidence that the information contained in its letter should be afforded confidential treatment.¹¹

Star Wireless' request appears to be premised on the assumption that the Commission's procedures are insufficient to deter abuse of the Commission's process and that the Commission may fail to impose appropriate sanctions for such abuse. We strongly disagree. The Commission has repeatedly indicated that it is prepared to impose sanctions for abuse of administrative process.¹² Finally, to the extent Star Wireless is concerned that third parties, acting in good faith, may file pleadings against it based on the disclosure at issue, our confidentiality rules may not be used as a shield against the claims that may arise through the discovery of non-confidential information.

Accordingly, for the reasons discussed above, we DENY Star Wireless' request for confidential treatment. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.¹³

Memorandum Opinion and Order, 3 FCC Rcd. 6342, 6352 ¶ 41 (1988); Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Process, *Notice of Proposed Rulemaking*, 2 FCC Rcd. 5563, 5563 ¶ 2 (1987); *see also* Policy Regarding Character Qualifications In Broadcast Licensing, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd. 421 (1986), *appeal dismissed mem. sub nom* National Assoc. for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987) (strike pleadings, harassment of opposing parties, and violation of ex parte rules constitute abuse of process).

⁷ Letter at 4.

⁸ *Id.*

⁹ 47 C.F.R. § 0.459.

¹⁰ Letter at 4; 47 C.F.R. §§ 0.459(b)(6), (7).

¹¹ 47 C.F.R. § 0.459.

¹² *See* Commission Taking Tough Measures against Frivolous Pleadings, *Public Notice*, FCC No. 96-42, 11 FCC Rcd 3030 (1996) ("the Federal Communications Commission reminds parties to our proceedings and their attorneys that our rules prohibit the filing of frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the Commission or its staff.").

¹³ 47 C.F.R. § 0.331.

E. Ashton Johnston
Paul W. Jamieson
August 15, 2003

Pursuant to Section 0.459(g)¹⁴ of the Commission's rules, the Commission has provided notice to Star Wireless' counsel that it may, within 5 working days file an application for review by the Commission. If the application for review is denied, Star Wireless will be afforded 5 working days in which to seek a judicial stay of the ruling. If these periods expire without action by Star Wireless, its letter will be placed in a public file. Star Wireless' letter, however, will be accorded confidential treatment, as provided in Sections 0.459(g) and 0.461,¹⁵ until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

Sincerely,

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

¹⁴ 47 C.F.R. § 0.459(g).

¹⁵ 47 C.F.R. §§ 0.459(g), 0.461.