

CONFIDENTIAL – NOT FOR PUBLIC INSPECTION



August 25, 2017

BY HAND DELIVERY

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

Attn: Evan Morris
Media Bureau

***Re: Request for Confidential Treatment concerning Amended and Restated Request
for Waiver of Service Rules***

Dear Ms. Dortch:

Pursuant to Section 0.459 of the Commission’s Rules, 47 C.F.R. § 0.459, LocusPoint WDVb Licensee, LLC (licensee of WDVb-CD, Edison, NJ), and LocusPoint WLPD Licensee, LLC (licensee of WLPD-CD, Plano, IL) (collectively, “LocusPoint”), respectfully request that the Federal Communications Commission (“Commission”) withhold from public inspection and afford confidential treatment to the attached Amended and Restated Request for Waiver of Service Rules, which is marked “confidential” (the “Amended Waiver Request”). LocusPoint asks that the Commission keep confidential certain portions of the Amended Waiver Request, which is being submitted pursuant to section 6403(b)(4)(B) of the Middle Class Tax Relief and Job Creation Act of 2012 (the “Spectrum Act”) and section 73.3700(f) of the Commission’s rules, which allow for “flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services.” In addition to the unredacted version of the Amended Waiver Request attached hereto, LocusPoint is filing a redacted, public version of the Amended Waiver Request through the required LMS interface.

The Amended Waiver Request contains confidential and commercially sensitive information and should be kept confidential and withheld from public inspection under the Commission’s rules and the Freedom of Information Act (“FOIA”).¹ Under Subsection 0.457(d)

¹ See 5 U.S.C. §§ 552(b)(3), (4); 47 C.F.R. §§ 0.457(c), (d).

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of the Commission's rules and FOIA Exemption 4, "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are not required to be made available for public inspection.² Applying Exemption 4, courts have stated that commercial or financial information is confidential if its disclosure will either (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.³ As shown below, the information contained in the Amended Waiver Request meets these criteria.

In the event that Commission determines that this Request for Confidential Treatment should be rejected, LocusPoint asks that the Commission provide LocusPoint with prior notice of at least three (3) business days so that it may request, if it so desires, that the Commission return the Amended Waiver Request (along with the originally-filed Waiver Request) to it without consideration, as permitted under section 0.459(e) of the Commission's rules. LocusPoint therefore requests that the Amended Waiver Request receive confidential treatment throughout its pendency, as well as thereafter if it is returned without consideration.

In accordance with Section 0.459(b) of the Commission's Rules, this request is supported by the following showing:

- 1) *Identification of the specific information for which confidential treatment is sought.* Confidential treatment is sought for the portions of the Amended Waiver Request redacted in the publicly-filed version, which discuss LocusPoint's plans for developing and delivering innovative and valuable non-broadcast services over certain broadcast TV station spectrum to which LocusPoint stations have been reassigned in the post-Incentive Auction repacking.
- 2) *Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.* The Amended Waiver Request is filed pursuant to section 6403(b)(4)(B) of the Spectrum Act and section 73.3700(f) of the Commission's rules. The Commission allowed for such requests to be submitted "during a "30-day window commencing upon the date that the Channel Reassignment Public Notice is released" (i.e., by May 15, 2017). LocusPoint filed its original request within that window and LocusPoint has requested, to the extent necessary, that the Commission waive this deadline for the Amended Waiver Request. Since its original filing, and after discussions with FCC staff, LocusPoint has refined its approach regarding the flexible use that the requested waiver would allow. The Amended Waiver Request presents a more focused proposal for flexible use that features existing technologies and established interference management techniques.
- 3) *Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.* The Confidential Amended Waiver Request

² *Id.*

³ *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1992).

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contains proprietary commercial information protected by Section 0.457(d). The courts have given the term “commercial,” as used in Section 552(b)(4), its ordinary meaning.⁴ The Commission has broadly defined commercial information, stating that “[c]ommercial” is broader than information regarding basic commercial operations, such as sales and profits....⁵ The proprietary information contained in the Amended Waiver Request relates to innovative new wireless services that LocusPoint hopes to be able to offer in the competitive wireless marketplace and therefore falls squarely within this definition.

- 4) *Explanation of the degree to which the information concerns a service that is subject to competition.* The Amended Waiver Request directly relates to the highly competitive businesses of wireless data services. Should the Amended Waiver Request be granted, LocusPoint would enter the marketplace for wireless data services in New York and Chicago, two of the most populous and competitive local markets in the nation.
- 5) *Explanation of how disclosure of the information could result in substantial competitive harm.* Disclosure of the proprietary commercial information included in the Amended Waiver Request would result in substantial competitive harm to LocusPoint by revealing to competitors sensitive commercial information – such as its innovative concepts for developing wireless data services that can be transmitted in the broadcast band – which competitors and other market participants could use to LocusPoint’s disadvantage.
- 6) *Identification of any measures taken by the submitting party to prevent unauthorized disclosure.* LocusPoint does not release the proprietary commercial information contained in the Amended Waiver Request to the public in the normal course of business. LocusPoint maintains internal processes to ensure that such information is protected from public disclosure.
- 7) *Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.* LocusPoint does not release the proprietary commercial information contained in the Amended Waiver Request to the public in the normal course of business and does not provide the proprietary commercial information contained in the Amended Waiver Request to third parties except pursuant to arrangements that maintain confidentiality.
- 8) *Justification of the period during which the submitting party asserts that material should not be available for public disclosure.* LocusPoint respectfully requests that the Commission withhold the Confidential Amended Waiver Request from public inspection

⁴ See *Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980).

⁵ *Southern Company Request for Waiver of Section 90.629 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 1851, 1860 (1998) (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

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indefinitely. LocusPoint would not, in the normal course of business, provide the proprietary commercial information contained therein to the public at any time.

- 9) *Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.* Public release of the proprietary commercial information contained in the Amended Waiver Request would provide competitors of LocusPoint with inappropriate access to some of the company's most sensitive and innovative strategies and efforts to advance new technical developments.

For the foregoing reasons, we respectfully request that the Commission treat the Amended Waiver Request as confidential and withhold it from public inspection.

Please stamp the enclosed additional copy of this filing and return it to the waiting messenger. Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

By: /s/ William D. deKay
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Attachment

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