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VIA ELECTRONIC FILING

Office of Engineering and Technology
Federal Communications Commission
Washington, D.C. 20554

Re: Southwest Research Institute
Request for Confidentiality
OET File No. 0118-EX-ST-2007

To the Commission:

Pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459 (2005), and on behalf of Southwest Research Institute ("SwRI"), this is to request that the attached application and narrative statement be withheld from public inspection and afforded confidential treatment in accordance with Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and Sections 0.457(d)(2) and 0.459(b) of the Commission's Rules, 47 C.F.R. §§ 0.457(d)(2), 0.459(b)(2005).

Section 552(b)(4) of the Freedom of Information Act permits an agency to withhold from public disclosure any information that qualifies as "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Section 0.457(d)(2) of the Commission's Rules allows persons submitting materials that they wish withheld from public inspection in accordance with Section 552(b)(4) to file a request for non-disclosure. 47 C.F.R. § 0.457(d)(2). The requirements governing such requests are set forth in Section 0.459(b).

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

1. Identification of the specific information for which confidential treatment is sought:

SwRI seeks to maintain confidentiality for the following items:

- (a) The application for special temporary authority submitted under OET File No. 0118-EX-ST-2007;



Office of Engineering and Technology
Federal Communications Commission
February 27, 2007
Page 2

- (b) The exhibit, entitled "Supporting Statement and Request for Expedited Treatment" attached to the application submitted under OET File No. 0118-EX-ST-2007; and
- (c) The copy of the special temporary authorization ("STA") issued by the FCC in connection with this application to the extent it provides any confidential details regarding the experimentation to be conducted.

2. Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission:

The proceeding for which the information is submitted is that covered by OET File No. 0118-EX-ST-2007.

3. Explanation of the degree to which the information is commercial or financial or contains a trade secret or is privileged:

The application and the narrative statement contain information concerning the company's efforts to test certain wireless devices under contract with the Department of Defense. The technical details of the requested authorization and the test activity to be conducted by SwRI are treated by SwRI as highly confidential proprietary information. In addition, SwRI is obligated to keep the contract number confidential unless specific permission is granted by the Department of Defense for its disclosure. Disclosure of the confidential information could imperil American military and other personnel who are the ultimate beneficiaries of the efforts to be undertaken by SwRI. The commercial value of the work to be performed in this experiment and the prospect of future assignments for similar tasks from the Federal Government would be significantly undermined if the confidential information were disclosed. Thus, not only would disclosure damage SwRI's commercial relationships, it could also adversely affect those who stand to gain the most from these efforts.

The activities described in the STA request are treated by SwRI as confidential information that is sensitive commercial data of the type that organizations engaged in such work normally keep confidential and that SwRI keeps confidential. *See* 5 U.S.C. § 552(b)(4). SwRI has not announced or advertised these efforts to the public and all previous disclosures of such information to third parties has been

Office of Engineering and Technology
Federal Communications Commission
February 27, 2007
Page 3

limited and made only pursuant to agreements or professional relationships (*e.g.*, the attorney-client privilege) that carry an obligation of confidentiality.

Thus, the application and its attachment contain information about the company's business and relationships that is clearly "commercial" and "financial" in nature. *See Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980) (courts have given the terms "commercial" and "financial," as used in Section 552(b)(4), their ordinary meanings). In addition, the information provided in the electronic filing, the narrative statement, and the STA granted by the FCC that discloses certain technical details of the work to be carried out is "confidential." Under well-settled case law, such material "is 'confidential' . if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 764, 770 (D.C. Cir. 1974) (footnote omitted); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993).

4. Explanation of the degree to which the information concerns a service that is subject to competition:

The information contained in the application and narrative statement pertains to activities involving the testing of wireless devices that have a direct impact on the safety and security of personnel employed by the United States government in situations that may involve armed combat. Competitive testing services are offered by many firms. Part of the value of the work to be undertaken lies in the fact that the efforts are not known publicly. Thus, the value of the work could be irreparably compromised — and SwRI's competitive position impaired — if the basic technical details (*e.g.*, power, frequency and antenna details of the transmitters to be tested) and the contract number were disclosed for this could allow those who track such efforts to gain knowledge of the work being conducted and then take steps to render it of no benefit. The fact that SwRI is authorized to test wireless devices in support of a government contract, however, could be disclosed without impairing the commercial value of the work to be conducted.

Office of Engineering and Technology
Federal Communications Commission
February 27, 2007
Page 4

5. Explanation of how disclosure of the information could result in substantial competitive harm:

As noted above, the tests to be completed by SwRI involve the evaluation of certain wireless devices, the operation of which could have a direct impact on the value of the work to be conducted pursuant to the requested authority. The disclosure of the basic information concerning the tests would assist others in the development of systems that could undercut the value of the work to be done under the authority. It would also jeopardize SwRI's ability to obtain additional future work from the Department of Defense or its contractors. Thus, disclosure of information currently held in confidence could allow others to benefit unfairly from the investment of SwRI and those for whom this work is to be performed. Moreover, public disclosure of this application will likely cause harm to the company's competitive position. Given the highly competitive nature of the market for developmental testing services, this information could be used by competitors to enhance their market position at the company's expense. Under these circumstances, it is "virtually axiomatic" that the information qualifies for withholding under Exemption 4 of the Freedom of Information Act, *see National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976), and under Sections 0.457(d)(2) and 0.459(b).

6. Identification of any measures taken by the submitting party to prevent unauthorized disclosure:

As noted above, the company has not announced or advertised these efforts to the public and all previous disclosures of such information to third parties have been on a confidential basis..

SwRI protects the information through internal policies designed to keep proprietary information and other information subject to non-disclosure obligations confidential. These include the use of training, agreements regarding the use of information, and physically securing material containing confidential information.

7. Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties:

Information concerning the general principles pertaining to wireless equipment is available through books, periodicals, and websites. The information set forth in the attached materials, however, is treated by SwRI as confidential business information



Office of Engineering and Technology
Federal Communications Commission
February 27, 2007
Page 5

and is not made publicly available except within SwRI and then only on a “need-to-know” basis.

8. Justification of the period during which the submitting party asserts that material should not be available for public disclosure:

SwRI respectfully requests that this information be accorded confidential treatment until such time as it is publicly disclosed by SwRI or by the Department of Defense or other entities acting on its instructions or with its permission. An indefinite period of confidentiality is required because SwRI cannot predict at this time when the information will be made available for use by public or be announced publicly.

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

In addition, SwRI seeks confidential treatment of the grant issued under this application, to the extent such grant reveals confidential information contained in the application and narrative statement.

As a final matter, should the Commission deny the request for confidentiality, SwRI respectfully requests that the documents identified in this request be returned in accordance with Section 0.459(e) of the Commission’s Rules, 47 C.F.R. §§ 0.459(e)(2005).

Please contact me with any question concerning this matter. I can be reached at 202.719.7058 or dhilliard@wileyrein.com.

Respectfully submitted,

/s/ *David E. Hilliard*

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