November 9, 2012

Mr. Julius Knapp
Chief, Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Certification Application FCC ID QF7D50300800

Dear Mr. Knapp:

The above-referenced application, filed by Geophysical Survey Systems, Inc., seeks certification for a ground-penetrating radar (GPR) device. The application shows compliance with the Commission's Rules and does not require waivers.

We request that certain photographs showing the interior of the devices be withheld from public disclosure. The Commission has previously granted confidentiality under similar conditions to the following applications:

FCC ID QF750400 EA640311
FCC ID QF762000 EA291754
FCC ID QF75103A EA870041
FCC ID QLA250MHZ EA586775
FCC ID QLAMID EA364767
FCC ID QLA500MHZ EA369105
FCC ID QLA800MHZ EA813498

FACTUAL BASIS FOR CONFIDENTIALITY REQUEST

Ordinarily the Commission denies confidentiality to photographs of a device on the ground that the information they contain is freely available to a competitor, simply by purchasing the device and (if necessary) unscrewing the cover.

The devices in question are different. The interior is sealed, and its internal appearance is inaccessible to the purchaser.

To gain access to the views shown in the interior photographs, a competitor would have to purchase the device and then carry out the following steps:

1. Remove all of the tamperproof screws securing the cover to the rest of the enclosure. These are custom made security screws and unique to GSSI. They require a custom security screwdriver which is ONLY sold to GSSI and is never given out to customers.

Without this tool access to the interior of the product would require destroying part(s) of the antenna.

2. With the antenna enclosure open the various electronic assemblies must be dissembled in a careful and properly ordered manner to prevent irreversible damage to the components. To access to certain electronics of the antenna it is necessary to de-solder the transmitter AND sampler heads and then carefully disconnect and withdraw the assemblies from the shield /construct assembly. When these steps are done improperly the electronics can be severely damaged.

3. Use a drill to dismantle the rivets in the shield.

4. Absorbers are glued to the transmitter elements and cannot be removed undamaged. These absorbers have specific electrical properties and only work properly in the specific arrangement as built. A competitor is unlikely to have access to the right material, or even to know what grade of materials to use and the proper orientations to install them for use.

GSSI has never released instructions on how to disassemble its units, and does not answer questions on how to do so. This information is kept internal to the company. If a unit arrives at the company's repair facility showing evidence of such tampering, the company does not repair it, but charges the customer for a new unit plus freight costs.

The Commission's posting of the photographs would allow a competitor to bypass this difficult and expensive disassembly. From the photographs, a competitor can estimate:

1. the costs of manufacturing the printed circuit boards and mechanical housing;

2. the man-hours required to assemble the device;

3. any compatibility problems the manufacturer will have in designing new systems; and

4. the age of the electronic design (which gives valuable competitive information on upgrade and R&D efforts).

Access to interior photographs would almost permit a competitor to conduct a complete reverse engineering, to the point of producing a schematic.

We respectfully submit that manufacturers should not be required to hand over to competitors the fruits of years of expensive engineering.

LEGAL BASIS FOR REQUEST

The Freedom of Information Act (FOIA) protects from disclosure "commercial or financial information obtained from a person and privileged or confidential."[1] Information is confidential if it is "the kind of information 'that would customarily not be released to the public by the person from whom it was obtained,'"[2] and would cause "substantial harm to the competitive position of the person from whom the information was obtained."[3]

The D.C. Circuit in *Worthington Compressors* addressed the specific issue underlying the present request: the "additional wrinkle that the requested information is available, *at some cost*, from an additional source."[4] Here, of course, the "additional source" is the acquisition and destruction of a specimen unit, and the cost is that of repairing or replacing it following access to the interior.

According to the *Worthington* court, availability of the information through alternate sources triggers two additional inquiries: (1) the *commercial value* of the information, and (2) the *cost of acquiring* the information through the other means.[5] The court acknowledges that the submitting party can suffer competitive harm if the information has commercial value to competitors.[6] That is the case here. As explained above, the interior photographs disclose a great deal of expensive (and proprietary) engineering.

Once commercial value is established, the court turns next to the cost of acquiring the information by means other than agency disclosure. If competitors "can acquire the information [by other means] only at considerable cost, agency disclosure may well benefit the competitors at the expense of the submitter."[7]

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1 5 U.S.C. Sec. 552(b)(4).

2 *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304-05 (D.C. Cir. 1999), *quoting Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc). *See also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

3 *Worthington Compressors, Inc., v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981), *citing National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974).

4 *Id.* (italics in original).

5 *Id.*

6 *Id.*

7 *Id.*

The court goes on to note that competitors may get "quite a bargain" and a "potential windfall" if they can acquire hard-won proprietary information at FOIA retrieval costs.[8] (Here, of course, a competitor need not even file and prosecute a FOIA request, but can simply download the material from the Commission's website at no cost whatsoever.) Said the court: "Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government."[9]

A competitor's cost of acquiring the interior photographs, if they are not available on the Commission's website, amounts to the retail cost of a GPR unit. In the case of GSSI's products, this is typically in the range $5000 to $17,000. Although perhaps not a great deal of money in absolute terms, this is still a significant expenditure for a small company -- and all GPR manufacturers are small companies. It far exceeds the cost of a download from the Internet. That alone should warrant protection from disclosure.

CONCLUSION

Federal case law protects information submitted to an agency and (1) withheld from the public; (2) capable of causing substantial competitive harm to the submitter; and (3) expensive to acquire by other means. Unlike many other product photographs, the interior photographs of Geophysical Survey Systems, Inc. GPR devices meet all of these criteria, and so are entitled to protection against public disclosure.

Procedural note. Geophysical Survey Systems, Inc. does not request a final ruling on the issue at this time. We ask only that the Commission refrain from posting the photographs on its website, and defer further action pursuant to Section 0.459(d)(1), unless and until the Commission receives a properly framed request for inspection of the photographs.

Respectfully submitted,

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8 *Id.*

9 *Id.* (citation footnote omitted)