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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Authorization of)		
)		
STARSYS GLOBAL)	File Nos.	33-DSS-P-90(24)
POSITIONING, INC.)		42-DSS-AMEND-90
)		7-DSS-AMEND-94
To Construct, Launch and Operate a)		31-DSS-AMEND-94
Non-Voice, Non-Geostationary)		32-DSS-LA-94
Mobile Satellite System)		135-SAT-AMEND-95

REPLY OF STARSYS GLOBAL POSITIONING, INC.

Starsys Global Positioning, Inc. ("Starsys"), by its attorneys, hereby submits this reply to the "Opposition to Request for Confidential Treatment" ("Opposition") filed by Leo One USA Corporation ("Leo One").

BACKGROUND

Leo One's position in this matter is completely without merit. Leo One seeks access to a confidential contract between Starsys and Alcatel based solely on a bare allegation that Starsys may not have met the Commission's milestone condition in the Starsys authorization. As explained below, Leo One's position is inconsistent with Commission precedent and laws protecting trade secrets and other proprietary information provided to government agencies. 1/ Under Leo

1/ As Leo One knows, the contract here is covered by the Trade Secrets Act, which prohibits a government officer or employee from disclosing information that "concerns or relates to the trade secrets, processes, operations, style of work or apparatus." 18 U.S.C. § 1905. An exception exists, and sanctions do not apply, where the disclosure is "authorized by law," in particular the Freedom of

One's broad argument, a party could obtain access to the most sensitive information of its competitor merely by raising an unsupported claim regarding compliance with Commission policy or rules. Once it thereby puts an allegation "in play," according to Leo One, the party is entitled to access to all information that the Commission collects to evaluate the merits of the compliance allegation.

This novel theory is inconsistent with the law protecting proprietary information provided to the Commission. Adoption of the new Leo One approach would discourage parties from providing information to the Commission in the future, and encourage other competitors to seek access to contracts and similar documents under the cloak of a compliance complaint.

Furthermore, and most importantly, disclosure here would harm Starsys and the public interest by chilling the process by which satellite operators and vendors contract for and build spacecraft (and secondarily how vendors subcontract elements of a project). That is why, while Starsys has no objection to Commission review of the terms of its contract, it opposes as a matter of principle third party access to that contract. Satellite vendors and operators routinely enter into strict non-disclosure agreements before they begin substantive contract negotiations. Satellite contracts also restrict disclosure of contract information to third parties. The construction contract here contains such a provision. These

Information Act ("FOIA"). But this assumes that the FOIA, including its exemptions from disclosure, are properly implemented to protect the rights of the party supplying proprietary information. See Chrysler v. Brown, 441 U.S. 281 (1979).

understandings serve the public interest by encouraging operators and vendors to work freely and privately to negotiate and then build the best possible spacecraft without concern that proprietary information would leak to competing companies (whether other operators or other manufacturers). In contrast, if satellite vendors believed that operators would not resist disclosure of construction contracts, they could be less willing to negotiate favorable terms in the future. And if operators feared that their construction contracts could become public, they would have less incentive to innovate and compete in the satellite market itself.

For the reasons set forth in more detail below, the Bureau should deny Leo One access to the Starsys-Alcatel contract. Leo One has not met its burden to justify access to this highly proprietary document.

I. THE STARSYS CONSTRUCTION CONTRACT IS EXEMPT FROM DISCLOSURE.

First of all, there is no question that the construction contract between Starsys and Alcatel is among the “records not routinely available for public inspection” as provided in Section 0.457 of the Commission’s rules. Specifically, Section 0.457(d), implementing FOIA Exemption 4, authorizes the Commission to withhold from public inspection “materials which would not customarily be released to the public” by the person submitting them. The rules further provide that if “the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required” in these circumstances. 47 C.F.R. § 459(d)(2)(i).

This is a very high standard. The Commission recently observed that it has exercised its discretion to release FOIA Exemption 4 information only in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding or where the Commission has identified a compelling public interest in disclosure.” 2/

The contract between Starsys and Alcatel clearly falls within the ambit of Exemption 4. 3/ It contains the very most sensitive information concerning the design of the Starsys system, the cost of the system, the schedule for implementation of the system, and other related matters. 4/ The contract expressly provides that neither party is permitted to disclose proprietary contract information publicly to third parties in any respect. As noted above, Starsys believes as a

2/ Notice of Inquiry and Notice of Proposed Rulemaking, Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, 11 FCC Rcd 12406, para. 21 (1996) (emphasis added).

3/ Leo One complains that Starsys did not adequately support its request for confidential treatment at the time that it supplied the contract. However, Starsys did not anticipate that any party would contest that the terms of a construction contract are clearly within the scope of Exemption 4. See also Western Union Telegraph Co., 2 FCC Rcd 4485, 4486, para. 9 (1987)(not rigorously enforcing showing requirement when submissions contain data that would ordinarily be considered confidential).

4/ Thus, this situation is entirely different from those cited by Leo One where the Commission granted disclosure to aggregated information. See AT&T Corp., 11 FCC Rcd 2425, para. 11 (1996) (no competitive harm to AT&T and its vendors from aggregate figures in an application making cost projections); New York Telephone Co., 5 FCC Rcd 874 (1990) (access granted in part because report contains information in summary form, which “diminishes significantly the likelihood” of competitive injury). Id. at para. 4.

matter of principle that the confidentiality of construction contracts must be protected to the maximum extent. 5/

Leo One does not even begin to meet its burden for obtaining access to this confidential information. This is not a case where, as referenced above, a party has put its own financial position at issue to justify denial of another party's application. Leo One attempts to rely on such precedent. 6/ But in these cases the Commission concluded only that, if a party has raised its financials as a sword, the other party is entitled to review those financials. But that is hardly this case. Here it is Leo One that is raising bare allegations regarding Starsys, and using them as a lever to try and gain access to our contract.

5/ For that reason, Starsys would have contested the Commission's request for submission of the contract if it had foreseen any possibility that a competitor might be granted access to it. Exemption 4 is provided in part to eliminate the need for disputes among the Commission and parties over the scope of information requests. But grant of Leo One's request here would undercut that important policy goal. See, e.g., Western Union Telegraph, *supra*, 2 FCC Rcd at 4486, paras. 10-12.

6/ Leo One cites Knoxville Broadcasting Corp., 87 FCC2d 1103 (1981), where the Commission found that disclosure of financial information was appropriate only because "by raising the issue of its financial condition the submitter of the reports has determined that the benefits it may gain by participating in the Commission's proceedings outweigh any possible competitive harm it might expect from release of the information." *Id.* at para. 8. Even there the Commission gave the filer the option of abandoning its argument to protect itself from disclosure. Leo One also cites Classical Radio for Connecticut, Inc., 69 FCC2d 1517 (1978). But there too disclosure rested on the fact that "the party filing the reports place[d] its own financial condition in issue." *Id.* at para 10.

II. A BARE COMPLIANCE ALLEGATION IS NOT A “PERSUASIVE” SHOWING JUSTIFYING DISCLOSURE.

Furthermore, Leo One has hardly demonstrated that this case falls into the category where there is a “compelling public interest in disclosure.” ^{7/} This matter is akin to an enforcement proceeding in which a party has made a bare allegation that another party has violated the terms of its authorization. That allegation is the foundation of Leo One’s request here. Leo One began this process by alleging that Starsys may not have met its construction commencement milestone. Leo One’s allegations rested on hearsay in a newspaper article. In response, the Commission staff asked Starsys to provide it with an attested copy of the contract. Starsys did so.

Significantly, Starsys also has placed in the public record and served Leo One with a letter answering the allegations that Starsys did not meet its milestone last November. That letter, signed by a Starsys officer, states that: the Starsys contract with Alcatel was executed on November 27, 1996, amending and restating a contingent contract that the parties entered into in June 1996 to remove the contingency; the contract contains no material contingencies; and Alcatel is committed to complete construction of the first two satellites of its system within the deadline specified in the Starsys authorization. ^{8/} Leo One has not presented any foundation for challenging these simple facts. Its interests are more than

^{7/} Notice of Inquiry and Notice of Proposed Rulemaking, supra.

^{8/} See Letter of Philip V. Otero to Thomas Tycz (June 3, 1997).

protected by the fact that the Commission can verify them by direct reference to the contract.

Thus, this is far from being one of the “very limited circumstances” where disclosure of Exemption 4 materials is justified. Again, this proceeding is akin to an enforcement action in which the Commission is examining Leo One’s bare allegations to determine if further action is needed. In a similar proceeding the Commission protected confidential information provided by the party against whom a complaint was lodged from disclosure of that information to the complainant. In that case the Common Carrier Bureau decided that the complaint had no merit, decided not to pursue the investigation further, and took no action. The complainant then argued that it should be granted access to the confidential information simply because the information was relevant to the allegations “squarely at issue” in the proceeding that the complainant itself had opened by filing its complaint. But the Commission disagreed, emphasizing that, “[w]ith limited exceptions, the Commission generally has not disclosed confidential commercial or financial information, even where that data has been an integral part of a formal or an informal investigation.” ^{9/} Noting “the strong Congressional policy against unauthorized disclosure of confidential commercial data expressed” in the Trade Secrets Act and Exemption 4 of the FOIA, the Commission denied access to the proprietary information. ^{10/}

^{9/} Leesburg Communications and Answering Service, Inc., 89 FCC 2d 119, para. 8 (1982).

^{10/} Id.

Leo One is essentially engaged in a similar bootstrapping exercise. It is claiming that because it raised an unsupported allegation regarding Starsys compliance, it is entitled to access that competitor's proprietary construction contract. And Leo One is making this claim even after that Starsys has rebutted the allegation through direct statements supported by a confidential filing of the contract with the Commission staff. ^{11/} The Commission staff, in its enforcement capacity, can clearly find that Leo One's arguments are without merit, and terminate this proceeding now.

III. NON-DISCLOSURE IS WARRANTED UNDER BOTH PRONGS OF THE NATIONAL PARKS TEST.

Leo One's "compliance" argument must be rejected, not only for the prejudice it would cause Starsys, but also for the harmful precedent that it would set for the future. The Starsys-Alcatel contract is protected under both prongs of the National Parks test: disclosure would both directly impair the ability of the FCC to collect necessary information regarding contracts or other proprietary information in the future, and cause substantial harm to the competitive position of

^{11/} Of course, Leo One is not entitled to the contract simply because it shaped its complaint in the form of a "petition to revoke." Leo One has made an allegation. The Commission has made an inquiry in response to that allegation. Starsys has responded. The Commission is free to take no further action given that no violation has occurred.

Any other result would put form over substance. It would encourage parties to attack their competitors by alleging violations in the form of a revocation petition rather than a complaint. But FOIA exemption 4 is equally applicable in either circumstance.

Starsys. ^{12/} Satellite operators (and others) would necessarily be reluctant to provide such data if disclosure could be achieved based on a mere allegation of a violation. The Bureau would be encouraging other parties to bring complaints against their competitors in order to obtain access to proprietary information, knowing that simply making an allegation is sufficient to put an issue "in play" and thereby secure access to relevant confidential documents.

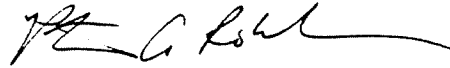
Furthermore, as discussed above, Starsys would clearly suffer prejudice from release of contractual information to a competitor. Disclosure of the trade secrets and proprietary information in the contract would prejudice Starsys's position in the competitive market for data messaging and positioning. Leo One (and potentially others) would learn sensitive information regarding Starsys system cost, technology, design and operational parameters. Disclosure also could chill the willingness of Alcatel or other manufacturers to cooperate with Starsys on further system refinements and other changes in construction plans by virtue of the fact that such changes might be publicly disclosed. Current and potential Alcatel subcontractors also could be discouraged by the possibility that their construction activities would be subject to public disclosure and scrutiny by a competing NVNG MSS operator.

^{12/} See National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); accord, Critical Mass Energy v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993); Western Union Telegraph Co., *supra*, 2 FCC Rcd at 4485.

Starsys recognizes that sometimes the Commission faces hard decisions in balancing confidentiality interests with the interest in expanding a record. However, this is not one of those hard cases. The Commission (and Leo One) have all the information they need to find that Starsys met its construction commencement deadline. Unsupported allegations and complaints by Leo One cannot justify its request to see a competitor's contracts. That is what the Trade Secrets Act and Exemption 4 of the FOIA are all about.

Respectfully submitted,

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By  _____

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July 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of Starsys Global Positioning, Inc. was sent by first-class mail, postage prepaid, this 1st day of July, 1997, to each of the following:

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