

February 11, 2011

VIA IBFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Request for Confidential Treatment

**Spectrum Five LLC, IBFS File No. SAT-MOD-20101126-00245
(Call Signs S2667 and S2668)**

Dear Ms. Dortch:

Spectrum Five LLC (“Spectrum Five”), respectfully requests that, pursuant to Sections 0.457 and 0.459 of the Commission’s rules, 47 C.F.R. §§ 0.457 and 0.459, the Commission withhold from public inspection and accord confidential treatment to certain information submitted on February 11, 2011 in response to the Federal Communications Commission’s (“Commission” or “FCC”) letter dated January 13, 2011 requesting additional information relating to Spectrum Five’s above-referenced application (“Spectrum Five Response”).

Exemption 3 exempts from public disclosure “[m]aterials that are specifically exempted from disclosure by statute,” provided that the statute “(1) requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of materials to be withheld.”¹ The Commission has determined that Exemption 3 applies to Section 4(j) of the Communications Act, which provides, in part, that “[t]he Commission is authorized to withhold publication of records of proceedings containing secret information affecting the national defense.”²

Exemption 4 permits parties to withhold from public information “trade secrets and commercial or financial information obtained from a person and privileged or confidential-categories of materials not routinely available for public inspection.”³ Applying Exemption 4, the 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

¹ 5 U.S.C. § 552(b)(3).

² 47 U.S.C. § 154(j); *see* 47 C.F.R. § 0.457(c)(1).

³ 47 U.S.C. § 552(b)(4).

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substantial harm to the competitive position of the person from whom the information was obtained.⁴

Section 0.457(d)(2) allows persons submitting materials that they wish be withheld from public inspection in accordance with Section 552(b)(4) to file a request for non-disclosure, pursuant to Section 0.459. In accordance with the requirements contained in Section 0.459(b) for such requests, Spectrum Five hereby submits the following:

(1) *Identification of Specific Information for Which Confidential Treatment is Sought (Section 0.459(b)(1))*. Spectrum Five seeks confidential treatment for documents produced by Space Systems/Loral, Inc. (“Space Systems/Loral”) as part of Critical Design Review (“CDR”) for Spectrum Five’s satellite system at the 114.5° W.L. orbital location produced in Attachment B to Spectrum Five’s Response. These documents were prepared for Spectrum Five by the satellite vendor, Space Systems/Loral, which has labeled the documents proprietary. Additionally, Spectrum Five seeks confidential treatment for amendments to Spectrum Five’s construction contract with Space Systems/Loral and an explanation of these amendments produced in Attachment A to Spectrum Five’s Response. Finally, Spectrum Five seeks confidential treatment a list of the payments that have been made pursuant to the contract produced in Attachment C to Spectrum Five’s Response. The documents described herein contain commercially sensitive information that falls within Exemption 4 of FOIA.

(2) *Description of Circumstances Giving Rise to Submission (Section 0.459(b)(2))*: Spectrum Five submits these documents in response to a letter from the FCC dated January 13, 2011 requesting supplemental information in connection with Spectrum Five’s petition for a declaratory ruling to extend or waive the interim construction milestone associated with its authorization to provide Direct Broadcast Satellite (“DBS”) service in the United States from a Netherlands-authorized “tweener” satellite network at 114.5° W.L.

(3) *Explanation of the Degree to Which the Information is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))*: The CDR materials, agreements, and payment information contain sensitive commercial information that competitors could use to the disadvantage of Spectrum Five and Space Systems/Loral. The courts have given the term “commercial”, as used in Section 552(b)(4), its ordinary meaning. *See Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980). The Commission has broadly defined commercial information, stating that “[c]ommercial” is broader than information regarding basic commercial operations, such as sales and profits; it includes information about work performed for the purpose of conducting a business’s commercial operations.” *Southern Company Request for Waiver of Section 90.629 of the*

⁴ *See National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)(footnote omitted); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

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)).

The CDR materials, agreements, and payment information contain commercial information regarding the operation of Spectrum Five's satellites and the negotiations involved with construction of these satellites. The information contained in the chart meets both definitions of "confidential." First, a decision not to treat this information as confidential could affect the Commission's ability to obtain necessary information in the future. Second, disclosure of this information likely will cause substantial harm to the competitive position of Spectrum Five and Space Systems/Loral.

Additionally, some of the CDR materials contain "Technical Data" as defined under the International Traffic in Arms Regulations ("ITAR") (22 C.F.R. § 120.10), and, as such, may not be exported, disclosed, or otherwise transferred to any "Foreign Person" as defined under the ITAR (22 C.F.R. § 120.16) without the prior written authorization of the U.S. Government. The material is thus "secret information affecting the national defense" protected under Exemption 3 of FOIA.

(4) *Explanation of the Degree to Which the Information Concerns a Service that is Subject to Competition (Section 0.459(b)(4))*: Substantial competition exists in the telecommunications satellite industry. Other players in the DBS satellite services market include DISH and DIRECTV, among others. The presence of competitors makes imperative the confidential treatment of sensitive commercial information.

(5) *Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))*: Release of the CDR materials, agreements, and payment information containing commercially sensitive information could have a significant impact on the commercial operations of Spectrum Five. If business partners/customers or competitors had access to this information, it could negatively impact Spectrum Five's future negotiations with potential and existing business partners/customers. Business partners/customers could use the information gleaned from the agreements and payment information to negotiate more favorable terms in their own agreements. Competitors could use this information to better compete against Spectrum Five. Thus, it is "virtually axiomatic" that the information qualifies for withholding under Exemption 4 of FOIA, *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 to Prevent Unauthorized Disclosure (Section 0.459(b)(6))*: None of this information is provided to the public, and Spectrum Five and Space Systems/Loral do not provide this information to third parties except pursuant to agreements to maintain confidentiality.

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(7) *Identification of Whether the Information is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))*: The CDR materials, containing Space Systems/Loral proprietary information, was prepared by Space Systems/Loral specifically for Spectrum Five. Spectrum Five have not made the CDR materials, agreements, or payment information, which all contain commercially sensitive information, available to the public and have not disclosed it to any third parties that are not subject to confidentiality obligations.

(8) *Justification of Period During Which the Submitting Party Asserts that the Material Should Not be Available for Public Disclosure (Section 0.459(b)(8))*: Spectrum Five respectfully requests that the Commission withhold the CDR materials, agreements, and payment information containing commercially sensitive information from public inspection indefinitely. On balance, the need to protect Spectrum Five from competitive harm as a result of disclosure of this information outweighs any benefit of public disclosure which, in the ordinary course of business, would not otherwise occur.

Accordingly, for the foregoing reasons, Spectrum Five respectfully requests that the CDR materials, agreements, and payment information containing commercially sensitive information submitted herein be kept confidential and be withheld from public inspection at all times. Should this request be denied, Spectrum Five requests that this commercially sensitive information be returned to Spectrum Five and that it not be made public. *See* 47 C.F.R. § 0.459(e).

Please contact the undersigned with any questions. Thank you for your assistance.

Sincerely,

/s/ David Wilson

David Wilson
President
SPECTRUM FIVE