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October 2, 2009

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

Re: Certification Application FCC ID QF7270LL3P

Dear Mr. Knapp:

The above-referenced application, filed by Geophysical Survey Systems, Inc., seeks certification of a public safety device for locating trapped or unconscious persons behind walls or under rubble. The application shows compliance with the Commission's Rules and does not require a waiver.

We request that certain photographs showing the interior of the device be withheld from public disclosure.

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.

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

In principle a competitor could simply purchase a unit and inspect it. But a unit costs approximately \$20,000 – a very substantial investment. If the Commission discloses the photographs, the competitor has easy access to the same information for free. Disclosure would thus seriously distort the competitive market for this category of product.

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 purchase of a specimen product for approximately \$20,000.

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

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.*

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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 \$20,000, which far exceeds the cost of a download from the Internet. That alone warrants 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. The interior photographs of the product in question 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)