

FEDERAL COMMUNICATIONS COMMISSION  
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August 15, 2008

**BY MAIL and EMAIL**

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**BY EMAIL, Parties to WT Docket 08-60**

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**Re: FOIA Control No. 2008-613, WT Docket 08-60**

Gentlemen:

For the reasons stated below, the Mobility Division of the Wireless Telecommunications Bureau (Bureau) hereby GRANTS IN PART AND DENIES IN PART the Freedom of Information Act request of Skybridge Spectrum Foundation (Skybridge), filed on July 31, 2008. Skybridge seeks all documents that Progeny LMS, LLC (Progeny) filed in support of its request for additional time to meet the construction requirements for its Multilateration Location and Monitoring Services (M-LMS) licenses (Progeny Request)<sup>1</sup> and for which Progeny requested confidential treatment.

We have identified one responsive document: Attachment A to Progeny's Request, which Progeny filed with a request for confidential treatment on May 1, 2008. We conclude that certain information contained in Attachment A is exempt from disclosure under FOIA Exemption 4, which protects from disclosure "commercial or financial information obtained from a person [that is] privileged or confidential."<sup>2</sup> Under Exemption 4, "commercial" information includes anything "pertaining or relating to or dealing with commerce."<sup>3</sup> Progeny seeks to protect information regarding its efforts to engage third parties to develop M-LMS equipment and applications. Exemption 4 includes "commercial information concerning a third party" and protection is therefore available regardless of whether the information pertains directly to the commercial interests of the party that provided it.<sup>4</sup> In order to come within the scope of Exemption 4, information in Attachment A not only must be "commercial," it must also be "confidential or

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<sup>1</sup> See "Wireless Telecommunications Bureau Seeks Comment on Request of Progeny LMS, LLC for Waiver of Location and Monitoring Service (LMS) Construction Rule," WT Docket 08-60, *Public Notice*, 23 FCC Rcd 7368 (2008).

<sup>2</sup> 5 U.S.C. § 552(b)(4). See *National Parks & Cons. Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

<sup>3</sup> *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978).

<sup>4</sup> See *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 405 (D.C. Cir. 1980) (holding that the "plain language" of Exemption 4 "does not in any way suggest that" the requested information "must relate to the affairs of the provider").

privileged.”<sup>5</sup> In *National Parks*, the U.S. Court of Appeals for the District of Columbia Circuit determined that commercial information is “confidential” where its disclosure is likely “to cause substantial harm to the competitive position of the person from whom the information was obtained.”<sup>6</sup> As a general matter, the harm must flow from affirmative use of the information and not consist solely of injuries that would flow from customer disgruntlement or public embarrassment.<sup>7</sup>

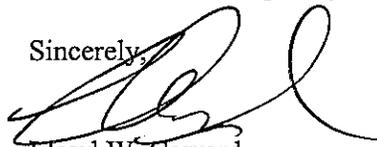
We have carefully reviewed Attachment A and determined that the identity of a certain equipment developer, technologies, and financial terms are protected from disclosure under Exemption 4. We find that disclosure of such information is likely to cause substantial harm to the competitive position of Progeny by giving Progeny's competitors insight into its plans. Accordingly, we have redacted such information from Attachment A; a redacted version of Attachment A is enclosed.<sup>8</sup> There is no fee associated with the processing of Skybridge's FOIA request.

**RIGHT TO FILE COMMENTS.** We hereby grant leave, on our own motion, to Skybridge Spectrum Foundation and all other parties to WT Docket 08-60 to file supplemental comments in WT Docket 08-60 within five business days of this letter ruling, using the information in the enclosed redacted version of Attachment A.

**RIGHT TO APPEAL.** If you consider this letter to be a denial in part of your FOIA request, pursuant to Section 0.461(j) of the Commission's rules, 47 C.F.R. § 0.461(j),<sup>9</sup> you may file an application for review of the Bureau's handling of your FOIA request. Such an application for review must be filed with the Office of General Counsel within 30 days from the date of this letter at the following address: Office of the General Counsel, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554.

If you have any questions regarding the foregoing, please call or email Richard Arsenault, Chief Counsel, Mobility Division, 202 418-0920/richard.arsenault@fcc.gov.

Sincerely,



Lloyd W. Coward  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau

cc: Shoko Hair

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<sup>5</sup> 5 U.S.C. § 552(b)(4).

<sup>6</sup> *National Parks*, 498 F.2d at 770. The Commission's rules explicitly list certain types of materials in the category of trade secrets and commercial and financial information that are automatically afforded protection from public inspection. See 47 C.F.R. § 0.457(d)(1).

<sup>7</sup> See, e.g., *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152, 1154 & n.158 (D.C. Cir. 1987); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983); *Center to Prevent Handgun Violence v. United States Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997).

<sup>8</sup> Pursuant to Section 1.1204(a)(10), staff requested and obtained Progeny's consent to disclosure of the unredacted portions of Attachment A. See 47 C.F.R. § 1.1204(a)(10).

<sup>9</sup> See 47 C.F.R. § 0.461(j).

Progeny LMS, LLC  
Request for Waiver and Limited Extension of Time  
Attachment A

In addition to the activities described in the Extension Request, Progeny also sought to develop a straightforward adaptation of an existing wireless standard, modified to accommodate the 900 MHz frequency and the LMS-specific requirements.

In pursuit of this goal, on May 1, 2007, Progeny contracted with [ ] for a total contract price of \$ [ ] plus certain out of pocket expenses. The contractor was to develop and produce, subject to certain technical and regulatory developments, a 900 MHz version of the [ ]. The contractor was to evaluate [ ] and alternative methods for multilateration. Both mobile and base station equipment developed under the contract would be designed to operate within the limits proposed by Progeny to the Commission in an *ex parte* letter on April 3, 2007.<sup>1</sup>

However, following a meeting with members of the Commission staff on February 1, 2008, it became apparent that the Commission was unprepared to accept Progeny's April 3, 2007 proposals or anything similar to them at this time. The contract was therefore terminated effective March 5, 2008. The cost of the abandoned project, including subcontractors and consultants, has not yet been finally determined. It is estimated to be approximately \$ [ ]

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<sup>1</sup> See *Ex Parte of Progeny LMS, LLC*, WT Docket 06-49 (Apr. 3, 2007).