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November 7, 2002

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

Re: Certification Applications: Mala GeoScience AB

FCC ID QLA250MHZ	**EA586775**
FCC ID QLAMID	**EA364767**
FCC ID QLA500MHZ	**EA369105**
FCC ID QLA800MHZ	**EA813498**

Dear Mr. Thomas:

The above-referenced applications, filed by Mala GeoScience AB, seek certifications for ground-penetrating radar (GPR) devices. The applications show compliance with the Commission's Rules and do not require waivers.

Request for Confidentiality

The applicant made timely requests under Section 0.459 that certain photographs showing the interior of the devices be withheld from public disclosure.

FCC Response

FCC laboratory personnel informed the applicant that confidential treatment of the internal photographs is not permitted.

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.

But the devices in question are different. The interior is sealed, and its appearance is inaccessible to the purchaser. *The device is intentionally made difficult to open.*

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

1. Use a drill to dismantle all the rivets securing the cover. A competitor has no way of knowing the correct drill size, or where to begin dismantling. Use of the wrong drill, or starting with the wrong rivets, will require replacing all mechanical parts.

2. Destroy the loading of both the transmitter and receiver. Absorbers are glued to the transmitter and receiver elements and cannot be removed undamaged. The antenna flares are connected to the RF absorbers, as well as to the metallic shields with thin layers of absorbers glued in place. These strips cannot be loosened without destroying them. A competitor is unlikely to have access to the right material, or even to know what grade of materials to use.

3. Use a screwdriver to dismantle the shields and the top plate.

4. De-solder the sampler head, so as to remove the electronics. But high-performance, temperature-sensitive Schottky bridges are placed directly at the soldering point connecting the sampler head to the preamp transmission line. Efforts to remove the electronics are thus likely to cause serious damage.

Mala Geoscience 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 could estimate:

1. the costs of manufacturing the breadboards 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).

The interior photographs required with an application would almost permit a competitor to conduct a complete reverse engineering, to the point of producing a schematic.

We 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]

There can be no serious question that the photographs at issue here meet both of these tests. Mala Geoscience does not make public the appearance of the interior of its products; it deliberately makes the interior difficult to access; and it withholds information on disassembly techniques. Disclosure would cause substantial harm by revealing engineering details that are not otherwise available.

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

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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).

[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).

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 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 certainly 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]

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 RF unit. Disassembly for inspection substantially destroys the unit, so that cost cannot be recovered. In the case of Mala's products, the cost is typically in the range $2,750-3,500. 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. Certainly the amount far exceeds the cost of a free download from the Internet -- and that alone should warrant protection from disclosure.

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5 *Id*. (italics in original).

6 *Id*.

7 *Id*.

8 *Id*.

9 *Id*. (citation footnote omitted).

Conclusion

Federal case law protects information submitted to an agency and (1) otherwise withheld from the public; (2) capable of causing substantial competitive harm to the submitter; and (3) available by other means only at significant cost. Unlike many other product photographs, the interior photographs of Mala Geoscience's GPR devices meet all of these criteria, and so are entitled to protection against public disclosure.

Procedural note. Mala Geoscience does not request a final ruling 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. We would expect to brief the matter further at that time.

Respectfully submitted,

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