

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
MSNBC INTERACTIVE NEWS, LLC	)	FOIA Control No. 2006-474
	)	
On Request for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 29, 2008**

**Released: September 30, 2008**

**By the Commission:**

1. The Commission has before it an Application for Review (AFR) filed by MSNBC Interactive News, LLC (MSNBC) of the decision of the Office of Engineering and Technology (OET) denying the Freedom of Information Act (FOIA) request of MSNBC's reporter, Bob Sullivan, for records entered into the Commission's Network Outage Reporting System (NORS) during the most recent 24-month period. For the reasons described below, we deny the application for review.

**I. BACKGROUND**

2. In 1992, the Commission first adopted voluntary outage reporting rules for the wireline telecommunications industry to enable the Network Reliability Council (NRC),<sup>1</sup> other carriers, and manufacturers to be able to understand the causes of outages and determine whether an existing best practice adequately addressed the cause of that outage or whether a new best practice or standard was needed to avert future outages with similar causes.<sup>2</sup> In 2004, following the terrorist attacks of September 11, 2001, the Commission adopted mandatory outage reporting requirements for not only the wireline industry but also non-wireline telecommunications entities to meet "the critical need for rapid, complete, and accurate information on service disruptions that could affect homeland security, public health or safety, and the economic well-being of our Nation, especially in view of the increasing importance of non-wireline communications in the Nation's communications networks and critical infrastructure."<sup>3</sup>

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<sup>1</sup> The NRC, initially established by the Commission in 1992, advised the Commission on recommendations to ensure optimal reliability and interoperability of the nation's communications networks. It was renamed the Network Reliability and Interoperability Council (NRIC) after the enactment of 47 U.S.C. § 256 in the Telecommunications Act of 1996. NRIC VII, the last council, held its final meeting on December 16, 2006, and has now been terminated. *See generally* <www.nric.org> (describing the mission of NRIC VII to "[p]artner with the Federal Communications Commission, the communications industry and public safety to facilitate enhancement of emergency communications networks, homeland security, and best practices across the burgeoning telecommunications industry").

<sup>2</sup> *See Notification by Common Carriers of Service Disruptions*, 7 FCC Rcd 2010 (1992); 8 FCC Rcd 8517 (1993); 9 FCC Rcd 3911 (1994); and 10 FCC Rcd 11764 (1995) *adopting* former 47 C.F.R. Part 63.

<sup>3</sup> *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 19 FCC Rcd 16830 (2004) (*Part 4 Rules*) (adopting 47 C.F.R. Part 4), *partial stay granted* in 19 FCC Rcd 25039 (2004) (partial stay of the reporting as outages of DS3 simplex events that are corrected within five days of their discovery), petition for reconsideration pending.

Under the Part 4 rules adopted in 2004, entities have been required to submit outage reports via NORS.<sup>4</sup>

3. The outage reports voluntarily filed under the Commission's original outage reporting rules were generally available to the public.<sup>5</sup> However, concerns were raised in the *Part 4 Rules* proceeding about the public availability of the expanded, mandatory outage reports filed in NORS.<sup>6</sup> In light of the substantial competitive harm that would result from public disclosure of the outage reports and the adverse impact disclosure might have on the national defense and public safety goals of requiring the filing of outage reports, the Commission decided to amend its rules "to provide that outage reports are presumptively protected from public disclosure"<sup>7</sup> but that the public could seek access to the reports under established procedures for the inspection of records.<sup>8</sup> The Commission observed that "decisions with respect to specific records and the specific basis for withholding them must be made in the context of considering the facts underlying any [FOIA] requests, including consideration of the specific types of competitive injury that submitters point to in those cases."<sup>9</sup>

4. On August 7, 2006, Sullivan, a reporter for MSNBC, filed a FOIA request for "records entered into the FCC Network Outage Reporting System during the most recent 24-month period."<sup>10</sup> Sullivan also requested "a summary of outage reports filed by carrier."<sup>11</sup> OET did not notify carriers that had filed NORS reports of Sullivan's FOIA request, but it denied Sullivan's request, noting that under *Part 4 Rules* "we treat all outage reports as confidential information that is exempt from public disclosure under FOIA."<sup>12</sup> It also denied his request for summaries filed by carriers, stating that no such records existed.<sup>13</sup> MSNBC then filed an application for review of the denial of its request for the prior two years of outage reports.<sup>14</sup> MSNBC argues that OET failed to justify the invocation of FOIA Exemption 4, and also failed "to engage in the type of case-specific analysis that the rulemaking relied on said was necessary."<sup>15</sup>

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<sup>4</sup> See 49 C.F.R. Part 4; see also <[www.fcc.gov/pshs/outage/](http://www.fcc.gov/pshs/outage/)>.

<sup>5</sup> See *Notification by Common Carriers of Service Disruptions*, 9 FCC Rcd 3911, 3945 (1994) (outage reports are publicly available, subject to the filing of a request for confidential treatment by the carrier under 47 C.F.R. § 0.459); 10 FCC Rcd 11764, 11771 n.30 (1995) (outage reports available for public inspection and copying).

<sup>6</sup> See *Part 4 Rules*, 19 FCC Rcd at 16847-48.

<sup>7</sup> *Id.*, 19 FCC Rcd at 16855 citing 5 U.S.C. § 552(b)(4) (FOIA Exemption 4). See 47 C.F.R. § 4.2 ("Reports filed under this part will be presumed to be confidential.").

<sup>8</sup> See *Part 4 Rules*, 19 FCC Rcd at 16855; 47 C.F.R. § 4.2 ("Public access to reports filed under this part may be sought only pursuant to the procedures set forth in 47 CFR 0.461. Notice of any requests for inspection of outage reports will be provided pursuant to 47 CFR 0.461(d)(3).").

<sup>9</sup> *Part 4 Rules*, 19 FCC Rcd at 16855.

<sup>10</sup> Electronic FOIA Request from Bob Sullivan (Aug. 7, 2006) (FOIA Control No. 2006-474).

<sup>11</sup> *Id.*

<sup>12</sup> Letter from Julius P. Knapp, Acting Chief, OET, to Bob Sullivan (Sept. 19, 2006) (*FOIA Decision*). Subsequent to the issuance of this letter, responsibility for NORS was shifted to the new Public Safety and Homeland Security Bureau (PSHSB). See *Establishment of the Public Safety and Homeland Security Bureau and Other Organizational Changes*, 21 FCC Rcd 10867 (2006).

<sup>13</sup> See *FOIA Decision*.

<sup>14</sup> *Review of Freedom of Information Act Request*, FOIA Control No. 2006-474 (dated Oct. 16, 2006) (AFR).

<sup>15</sup> AFR at 2. MSNBC did not challenge OET's determination that there were no records responsive to the request for summaries of outage reports filed by the carriers.

5. Subsequently, the Commission received 16 new FOIA requests for NORS outage reports.<sup>16</sup> The Public Safety and Homeland Security Bureau (PSHSB) recognized that section 4.2 of the Commission's rules requires that notice of the FOIA requests for the outage reports be provided to all entities that had filed reports subject to the FOIA requests.<sup>17</sup> PSHSB therefore notified all filers of outage reports for the past two years of MSNBC's FOIA AFR and 15 of the new FOIA requests.<sup>18</sup> Thirty-seven responses were received opposing the release of the outage reports.<sup>19</sup> PSHSB denied all FOIA requests

<sup>16</sup> See FOIA Request of Maris Cuneo, FOIA Control No. 2007-081 (rec'd Dec. 18, 2006) ("Outage Report for Cell Phone Companies"); FOIA Request of Giles A. Meharg, FOIA Control No. 2007-082 (rec'd Dec. 18, 2006) ("Cell phone outage reports"); FOIA Request of Bladen Brannon, FOIA Control No. 2007-083 (rec'd Dec. 18, 2006) ("A detailed database of cell phone provider outages from the Network Outage Reporting System"); FOIA Request of Gregory Thomas Garten, FOIA Control No. 2007-084 (rec'd Dec. 18, 2006) ("Any detailed reports and/or information submitted to the FCC Network Outage Reporting System by cellular telephone carriers providing service to the Metro San Diego, California geographical region between the dates Jan. 2004 through November 2006"); FOIA Request of John Maurer, River Front Times, FOIA Control No. 2007-085 (rec'd Dec. 18, 2006) ("cell phone provider outages database report"); FOIA Request of William Farrell, FOIA Control No. 2007-086 (rec'd Dec. 18, 2006) ("outage reports from telecommunications carriers Sprint/Nextel, Verizon and Cingular since January 1, 2005"); FOIA Request of Matthew Brown, FOIA Control No. 2007-087 (rec'd Dec. 18, 2006) ("major cell phone companies 'outage' records over the past 5 years. Companies such as Verizon, Alltel, Cingular, T-Mobile, Sprint"); FOIA Request of Alan Hawkins, FOIA Control No. 2007-088 (rec'd Dec. 18, 2006) ("any type of database concerning service outages reported by wireless providers"); FOIA Request of Piotr Mitros, FOIA Control No. 2007-089 (rec'd Dec. 18, 2006) ("the report on wireless carrier availability. The FCC collects this information in the Network Outage Reporting System"); FOIA Request of Michael Rose, FOIA Control No. 2007-090 (rec'd Dec. 18, 2006) ("Any detailed reports and/or information submitted to the FCC Network Outage Reporting System by cellular telephone carriers providing service to the metro Atlanta, Georgia geographical region between the dates Jan. 2004 through November 2006"); FOIA Request of Ilan Rabinovitch, FOIA Control No. 2007-091 (rec'd Dec. 19, 2006) ("[all] studies conducted and data accumulated regarding the reliability of cellular, wireless and voice over IP telephone carriers who provide service in the United States"); FOIA Request of Kevin L. Bardon, FOIA Control No. 2007-094 (rec'd Dec. 20, 2006) ("Network Outage Reporting System records from 2004 to most current date for which records are available"); FOIA Request of Kelly Rice, WCNC-TV, FOIA Control No. 2007-112 (rec'd Jan. 4, 2007) ("records entered into the FCC Network Outage Reporting System during the most recent 24 month period in North Carolina and South Carolina and a summary of outage reports filed by carriers"); FOIA Request of Gerard Laurain, Neutral Tandem, FOIA Control No. 2007-115 (rec'd Jan. 4, 2007) ("Network Outage Information on Tandems"); FOIA Request of Eli Dickinson, FOIA Control No. 2007-299 (rec'd May 15, 2007) (seeking "a summary report of the Network Outage Reporting System"). One other FOIA Request for the outage reports was withdrawn by the requester. FOIA Request of Randy Smith, FOIA Control No. 2007-136 (rec'd Jan. 12, 2007) ("the wireless phone company airtime outages record").

<sup>17</sup> See 47 C.F.R. § 4.2 *referencing* 47 C.F.R. § 0.461(d)(3).

<sup>18</sup> See E-mails from Jeffery Goldthorp, Chief, Communications Systems Analysis Division, PSHSB, to Network Outage Reporting System Contacts (Jan. 11, 2007 and June 1, 2007).

<sup>19</sup> See Letter from Gerald J. Waldron, Esq. and John Blevins, Esq., Covington & Burling, to Jeffery Goldthorp, PSHSB (Jan. 22, 2007) (TDS Communications Opp.); ACS Wireless and WCS Long Distance, Inc. Response in Opposition to Review of Freedom of Information Act Action (Jan. 22, 2007) (ACS Opp.); Objection of Farmers Mutual Telephone Company (Jan. 22, 2007) (Farmers Mutual Opp.); Letter from Michael B. Fingerhut, Director, Government Affairs, Sprint, to Jeffery Goldthorp (Jan. 22, 2007) (Sprint Opp.); Opposition of AT&T Inc. to Application for Review and to FOIA Requests for NORS Records (Jan. 22, 2007) (AT&T Opp.); CTIA-The Wireless Association® Opposition to Application for Review of Freedom of Information Act (Jan. 22, 2007) (CTIA Opp.); Letter from Paul Brigner, Executive Director, Federal Regulatory Affairs, Verizon Communications, Inc., and John T. Scott, III, Vice President and Deputy General Counsel, Regulatory Law, Verizon Wireless, to Jeffery Goldthorp (Jan. 22, 2007) (Verizon Opp.); E-mail from Kelly Faul, XO Communications, to Jeffery Goldthorp (Jan. 22, 2007) (XO Opp.); E-mail from Susan H. Crandall, Assistant General Counsel, Intelsat, to Jeffery Goldthorp (Jan. 18, 2007) (Intelsat Opp.); E-mail from Jim Ucci, External Affairs Specialist, SouthernLINC Wireless to Jeffery Goldthorp (Jan. 15, 2007) (SouthernLINC Opp.); E-mail from Mike Brouillette, Star Communications, to Jeffery

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on the same grounds set forth in OET's denial of MSNBC's initial FOIA request.<sup>20</sup>

## II. DISCUSSION

6. For the reasons discussed below, we conclude that (i) disclosure of the outage reports would substantially impair the Commission's ability to obtain complete and accurate information as well as endanger homeland security, and (ii) the filers of the outage reports have demonstrated that substantial competitive harm will result from the release of their reports. We therefore deny MSNBC's application for review.

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Goldthorp (Jan. 12, 2007) (Star Opp.); E-mail from Troy Danos, Director of Network Operations, Lafourche Telephone Company, LLC, to Jeffrey Goldthorp (Jan. 12, 2007) (Lafourche Opp.); E-mail from Adrian VanBourgonchien, VP Network Operations, Global Crossing Telecommunications, Inc. (Jan. 12, 2007) (Global Crossing Opp.); E-mail from Jose Silva Rosario, Network Operations, Centennial Communications, to Jeffery Goldthorp (Jan. 26, 2007) (Centennial Opp.); Mobile Satellite Ventures Subsidiary, LLC Consolidated Opposition to Freedom of Information Act Requests and Application for Review (Jan. 23, 2007) (MSV Opp.); Letter from Ronald L. Ripley, Senior Vice President/General Counsel, Dobson Communications Corporation, to Marlene H. Dortch, Secretary (Jan. 22, 2007) (Dobson Opp.); Letter from David Robinson, Manager – Industry Relations, Syniverse Technologies, to Marlene H. Dortch (Jan. 22, 2007) (Syniverse Opp.); Letter from James W. Olson, Vice President Law and General Counsel, United States Telecom Association to Jeffery Goldthorp (Jan. 22, 2007) (USTelecom Opp.); Opposition of General Communications, Inc. (Jan. 22, 2007) (GCI Opp.); Letter from Janet S. Britton, Corporate and Regulatory Counsel, East Ascension Telephone Company, LLC d/b/a EATEL to Jeffery Goldthorp (Jan. 22, 2007) (EATEL Opp.); and Opposition of the National Cable & Telecommunications Association (Jan. 22, 2007) (NCTA Opp.). These responses were served on MSNBC and 14 of the additional FOIA requesters.

The following responses were served on the fifteenth additional FOIA requester, Mr. Eli Dickinson: Letter from Terri L. Hoskins, Senior Attorney, AT&T Services, Inc., to Jeffery Goldthorp (Jun. 8, 2007); Letter from Lisa R. Phillips, Manager, Regulatory Affairs, Alaska Communications Systems, to Jeffery Goldthorp (Jun. 8, 2007); Letter from Rebecca L. Murphy, Bennet & Bennet, PLLC, Counsel to AST Telecom, LLC, to Jeffery Goldthorp (Jun. 7, 2007); Letter from Thomas J. Moorman and Jessica W. Rhea, Woods & Aitken, LLP, Counsel to Bay Springs Telephone Company, Inc., to Jeffery Goldthorp (Jun. 8, 2007); Letter from Billy Layton, Wilkinson Barker Knauer, LLP, Counsel to Dobson Cellular Systems, Inc., to Jeffery Goldthorp (Jun. 8, 2007); Letter from David Bartlett, Embarq Local Operating Companies, to Jeffery Goldthorp (Jun. 8, 2007); E-mail from Les Ueoka, Assistant General Counsel, Hawaiian Telecom, Inc., to Jeffery Goldthorp (Jun. 8, 2007); E-mail from Karen Twenhafel, Senior Consultant, TCA, Inc., Consultant to Farmers Mutual Telephone Company, Glenwood Telephone Membership Corporation, The Peetz Cooperative Telephone Company and The S&T Telephone Cooperative Association, Inc., to Jeffery Goldthorp (Jun. 8, 2007); E-mail from Susan H. Crandall, Assistant General Counsel, Intelsat, to Jeffery Goldthorp (Jun. 7, 2007); E-mail from Thomas K. Braun, Senior Attorney, Southern California Edison Company, to Jeffery Goldthorp (Jun. 5, 2007); Letter from Bruce D. Jacobs, Pillsbury Winthrop Shaw Pittman, LLP, Counsel to Mobile Satellite Ventures Subsidiary, LLC (MSVS), to Jeffery Goldthorp (Jun. 8, 2007); E-mail from Jim Ucci, External Affairs Specialist, SouthernLINC Wireless, to Jeffery Goldthorp (Jun. 8, 2007); Letter from Jo-Ann G. Monroe, Sprint Nextel, Government Affairs-Federal Regulatory, to Jeffery Goldthorp (Jun. 8, 2007); E-mail from Shellie Blakeney, Federal Regulatory Affairs, T-Mobile USA, Inc., to Jeffery Goldthorp (Jun. 8, 2007); Letter from Paul R. Brigner, Executive Director, Federal Regulatory Affairs, Verizon Communications, Inc. on behalf of Verizon and Verizon Wireless, to Jeffery Goldthorp (Jun. 8, 2007); E-mail from Kelly Faul, XO Communications, to Jeffery Goldthorp (Jun. 8, 2007).

<sup>20</sup> Individual letters were sent to the FOIA requesters listed in note 16, *supra*, from Lisa Fowlkes, Deputy Bureau Chief, PSHSB (Feb. 27, 2007) (except for Randy Smith who withdrew his request), and letter from Lisa Fowlkes to Eli Dickinson (FOIA Control No. 207-299) (June 25, 2007). No new applications for review were filed.

### A. Procedural Issues

7. Several procedural issues are raised by the AFR. First, Sullivan filed the initial FOIA request in his name, but the AFR was filed by MSNBC. Under the Commission's rules, an application for review of an initial FOIA decision may only be filed by the person who filed the FOIA request.<sup>21</sup> However, Sullivan's FOIA request was sent from an MSNBC.com e-mail account and indicated that the records sought "will be used in research for a news story to be published on MSNBC.com."<sup>22</sup> Thus, it was clear he filed the request as a reporter for MSNBC, and we consider it appropriate for MSNBC to file the AFR.<sup>23</sup>

8. Second, while the AFR was dated October 16, 2006, the Office of General Counsel did not learn of or receive the AFR until MSNBC inquired about the status of its application for review in December 2006.<sup>24</sup> A FOIA application for review must be filed within 30 days of the initial FOIA decision and must be delivered or mailed to the General Counsel.<sup>25</sup> MSNBC provided evidence in the form of a delivery tracking report that it had indeed mailed the AFR on October 16, 2006 by overnight service to the Office of General Counsel, and that it had been received by the Commission's off-site facility on October 17, 2006.<sup>26</sup> Based on the submission by MSNBC, we accept the AFR as timely filed.

9. Third, PSHSB received three oppositions to the AFR and 15 initial FOIA requests from trade associations.<sup>27</sup> Our rules do not address the participation of trade associations in FOIA proceedings where the association is neither the FOIA requester nor the submitter of the subject records.<sup>28</sup> However, while our rules require us to solicit the views of entities that submitted records not open to routine public inspection,<sup>29</sup> the rules do not prohibit us from considering other information. In addition, our rules do permit persons acting "in a representative capacity" to transact business with the Commission.<sup>30</sup> PSHSB's solicitation of the views of the outage report filers were served on the companies that had filed outage reports in NORS, not on these three trade associations.<sup>31</sup> CTIA, NCTA and USTelecom do not themselves file outage reports. USTelecom indicates that it is filing on behalf of its members in

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<sup>21</sup> See 47 C.F.R. § 0.461(i) and (j).

<sup>22</sup> FOIA Request at 1.

<sup>23</sup> Compare *Russell D. Lukas*, 21 FCC Rcd 6680 (2006) (where the initial FOIA was filed by an attorney in his own name, without mention of a client, but the application for review was filed "on behalf of" a named client, the Commission held that the application for review was filed by the attorney who filed the initial FOIA request in his own name).

<sup>24</sup> See e-mail from Ann Marie Campbell, Legal and Corporate Affairs, Microsoft Corp. to Shoko Hair, FOIA@FCC.GOV (Dec. 12, 2006).

<sup>25</sup> 47 C.F.R. § 0.461(j).

<sup>26</sup> See *Leo A. Wrobel, Jr., Premiere Network Services, Inc.*, 21 FCC Rcd 2848, 2850 & n.16 (2006) (describing use of off-site facility and routing of mail).

<sup>27</sup> CTIA Opp., *supra*; NCTA Opp., *supra*; and USTelecom Opp., *supra*.

<sup>28</sup> See 47 C.F.R. §§ 0.461(i)(1) and (2) and 0.461(j). See also 0.461(d)(3) (FOIA requests for records submitted to the Commission with a request for confidentiality are provided "to the person who originally submitted the materials to the Commission" for a response).

<sup>29</sup> See 47 C.F.R. § 0.461(d)(3).

<sup>30</sup> 47 C.F.R. § 1.22; see 47 C.F.R. § 1.23(b).

<sup>31</sup> We note, however, that CTIA and USTelecom participated in the *Part 4 Rules* proceeding. See *Part 4 Rules*, App. A, 19 FCC Rcd at 16918.

opposition to MSNBC's FOIA request,<sup>32</sup> and we will accept its filing. There are many small entities subject to the outage report requirements, and it is reasonable for them to have their trade associations file on their behalf in this context. While neither CTIA nor NCTA specifically indicates that it is filing on behalf of its members, both indicate that their members' records are among those being sought by MSNBC.<sup>33</sup> Under the circumstances presented here, given the broad applicability of the outage report filing requirements, we will consider the CTIA and NCTA oppositions in this proceeding.

10. Finally, MSNBC argues that the OET, before ruling on its FOIA request, was required to obtain the views of the submitters of the outage reports as to whether Exemption 4 applies.<sup>34</sup> Section 4.2 of our rules specifically provides that notice of a FOIA request for the outage reports filed under Part 4 must be provided to filers of such reports.<sup>35</sup> While OET admittedly failed to provide such notice, PSHSB provided the notice to the filers of outage reports subject to MSNBC's AFR.<sup>36</sup> The Commission received 21 responses from the filers of outage reports or their trade associations.<sup>37</sup> Accordingly, we conclude that any error by OET in not soliciting the views of the submitters of the outage reports has now been cured.

## B. Confidentiality of the Outage Reports

11. In the *Part 4 Rules*, we concluded, based on comments received both from the Department of Homeland Security and the entities that would be subject to mandatory outage report filing, that the outage reports should be presumed to be confidential.<sup>38</sup> We noted that we are required to protect sensitive information "that would facilitate terrorist targeting of critical infrastructure and key resources,"<sup>39</sup> and that disclosure of the outage reports could identify key points of network vulnerability. We further explained that outage reports are properly withheld under FOIA Exemption 4 because there is a "likelihood of substantial competitive harm from the disclosure of outage reports to competitors."<sup>40</sup> We also noted that disclosure of the reports might adversely impact governmental programs.<sup>41</sup> Finally, the Commission explained that "the potential consumer benefits . . . are now substantially outweighed by the potential harm to the public and national defense that might result from disclosure."<sup>42</sup>

12. However, the *Part 4 Rules* permitted the public to request outage reports under the FOIA; provided that filers of reports sought under the FOIA be notified of the FOIA request and given the

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<sup>32</sup> See USTelecom Opp. at 1 (USTelecom files its opposition "on behalf of its members" which "include service providers that are subject to the Commission's outage reporting requirements").

<sup>33</sup> See CTIA Opp. at 1 (CTIA "is an association whose members would be harmed by the forced disclosure of the confidential and competitive sensitive data sought"); NCTA Opp. at 2 (stating that outage reports filed by NCTA's members are sought by MSNBC and several of the subsequently filed FOIA requests).

<sup>34</sup> See AFR at 2, 4-5.

<sup>35</sup> See 47 C.F.R. § 4.2.

<sup>36</sup> See note 18, *supra*.

<sup>37</sup> See note 19, *supra*.

<sup>38</sup> *Part 4 Rules*, 19 FCC Rcd at 16855.

<sup>39</sup> *Id.* at 16853, *citing* Homeland Security Presidential Directive 7, Part 10 (Dec. 17, 2003).

<sup>40</sup> *Id.* at 16854. We cited various examples of competitive harm adduced by the parties to the rulemaking proceeding.

<sup>41</sup> *Id.* at 16855 (*citing, e.g., Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1987), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*) (recognizing the program impairment prong of FOIA Exemption 4)).

<sup>42</sup> *Id.*

opportunity to respond; and required our assessment on a case-by-case basis whether the report should be withheld.<sup>43</sup> As noted above, while OET did not undertake a case-by-case inquiry as part of processing MSNBC's FOIA, PSHSB did so when the additional FOIA requests were filed, and copies of the responses submitted by the filers of the outage reports were served on MSNBC.<sup>44</sup> These responses amply support our finding that the outage reports are exempt from disclosure under FOIA Exemption 4.

13. Under FOIA Exemption 4, agencies may withhold documents obtained from a person that contain trade secrets and commercial and financial information that are privileged or confidential.<sup>45</sup> The exemption affords protection to submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. The D.C. Circuit has set forth a two-part test for determining whether commercial or financial information contained in required submissions is "confidential" under Exemption 4.<sup>46</sup> Such information is confidential "if disclosure of the information is likely ... either ... (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>47</sup> The court has also recognized that Exemption 4 protects other government interests, such as program effectiveness, in addition to the interests protected by the first prong (the impairment prong).<sup>48</sup>

14. There can be no doubt that the outage reports meet the threshold tests of Exemption 4, *i.e.*, that the information is commercial and was obtained from a "person." The reports contain commercial information.<sup>49</sup> For example, as AT&T observed, the reports "directly relate to the income producing aspects of the reporting AT&T entity's business."<sup>50</sup> Verizon stated that the outage reports contain information about the types of equipment it uses, the locations of the equipment, the configuration of its networks, and the methods and procedures for dealing with outages – in short, how it operates its business.<sup>51</sup> The comments also belie MSNBC's assertion that the reports are not proprietary and have no value.<sup>52</sup> The outage reports contain detailed information about the carriers' network, including the type and location of equipment deployed by the carrier.<sup>53</sup> Finally, the reports were obtained by the Commission from a "person" within the meaning of the exemption because businesses fall within the

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<sup>43</sup> *Id.* at 16855; 47 C.F.R. § 4.2.

<sup>44</sup> While OET did not have these responses available when it first considered and denied MSNBC's initial FOIA request, PSHSB's responses to the 15 additional FOIA requests for the outage reports (*see* note 16, *supra*) demonstrates it would have reached the same conclusions had the responses been available.

<sup>45</sup> 5 U.S.C. § 552(b)(4).

<sup>46</sup> *See National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*).

<sup>47</sup> *Id.*

<sup>48</sup> *Critical Mass*, 975 F.2d at 879.

<sup>49</sup> *See, e.g., Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (records are commercial so long as the submitter has a "commercial interest in them; the term 'commercial' is to be given 'ordinary meaning'" (citations omitted)).

<sup>50</sup> AT&T Opp. at 11-12.

<sup>51</sup> *See* Verizon Opp. at 2.

<sup>52</sup> *See* AFR at 3.

<sup>53</sup> *See* AT&T Opp. at 12 (reports "provide[] key details of the basic commercial operations of AT&T's networks and operations"); GCI Opp. at 1 (outage reports contain information about "the extent of a carrier's network [and] the type and location of facilities"); Verizon Opp. at 3-4 ("reports contain detailed information on the type of equipment deployed . . . , the specific locations of that equipment and the areas served by that equipment").

definition of “person” under FOIA Exemption 4.<sup>54</sup>

15. As we now discuss, the outage reports also meet both the impairment and competitive harm prongs of Exemption 4 for determining whether information is “confidential.” In the *Part 4 Rules*, we concluded that public release of the outage reports, as a general matter, would impair our ability to obtain these reports from entities subject to our jurisdiction and hence our ability to implement our statutory responsibilities under section 1 of the Communications Act, as amended.<sup>55</sup> In its response to MSNBC’s AFR, AT&T observed that it was “willing to supply information at this level of detail because [it] is relying on the Commission and [the Department of Homeland Security] to maintain confidentiality.”<sup>56</sup> If the reports were public, AT&T observed, it “would have to scrutinize more carefully the information it supplies and [it] may be less willing to supply a high level of detailed proprietary information.”<sup>57</sup> Similarly, Syniverse observed that filers “would have every incentive to seek ways within the rules to avoid reporting outages to prevent competitive harm or characterize outages in such a way as to put the provider in the best light without fully noting its own failures.”<sup>58</sup> These types of comments underscore our previous observation that “release of this information could also make regulated entities less forthright in the information submitted to the Commission at a time when it is especially critical that we obtain full and accurate information in order to prevent harm to the communications infrastructure.”<sup>59</sup> For these reasons, even though the outage reports are required to be filed, we conclude that making those outage reports at issue here public would significantly impair our ability to obtain complete and accurate outage reporting.<sup>60</sup> A lack of complete and accurate outage reports would impair the rapid governmental responses to the outages that are necessary to ensure or restore secure and stable communications, particularly in the face of natural disasters or terrorist attacks.<sup>61</sup> Thus, the reports are properly withheld under the impairment prong of Exemption 4.

16. We also conclude that the release of the reports at issue here would result in substantial competitive injury to the carriers filing the reports. The parties opposing MSNBC’s FOIA credibly explained in detail the harm that they would incur from release of the reports.<sup>62</sup> For example, several commenters indicated that release of the reports would reveal information about the types and deployment

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<sup>54</sup> See, e.g., *FlightSafety Servs. Corp. v. Dep’t of Labor*, 326 F.3d 607, 611 (5th Cir. 2003) (business establishments fall within the definition of person for Exemption 4 purposes); 5 U.S.C. § 551(2) (Administrative Procedure Act definition of person that applies to the FOIA includes an “individual, partnership, corporation, association, or public or private organization other than an agency”).

<sup>55</sup> See *Part 4 Rules*, 19 FCC Rcd at 16837, citing 47 U.S.C. § 151.

<sup>56</sup> AT&T Opp. at 13.

<sup>57</sup> *Id.* See also NCTA Opp. at 5; Dobson Opp. at 2.

<sup>58</sup> Syniverse Opp. at 2.

<sup>59</sup> *Part 4 Rules*, 19 FCC Rcd at 16855.

<sup>60</sup> See *Washington Post Co. v. U.S. Dep’t of Health & Human Svcs*, 690 F.2d 252, 269 (D.C. Cir. 1982) (“the question must be whether the impairment is significant enough to justify withholding the information”). Significantly, the D.C. Circuit in *Washington Post* recognized that even a compulsory disclosure requirement may not always be enough to compel complete and accurate disclosure. *Id.* at 268-69.

<sup>61</sup> *Part 4 Rules*, 19 FCC Rcd at 16836-37.

<sup>62</sup> See, e.g., MSV Opp. at 3 (release of outage reports would reveal “amounts of traffic or users on MSV’s system at any particular time”); Dobson Opp. at 2-3 (manipulation of data in reports would be used to competitive disadvantage); Syniverse Opp. at 2-3 (data would be manipulated); ACS Opp. at 5 (disclosure would “allow competitors to capitalize on their unfair knowledge of the technology ACS Wireless employs” and possibly allow competitors to interfere with ACS’s relationships with its vendors).



of their equipment and the traffic flows across their networks.<sup>63</sup> Further, commenters stated that the reports if released would reveal “market strategies” and “business strategies and their successes and failures.”<sup>64</sup> More than one commenting party pointed out that the information contained in the outage reports is not the type of information they make available to the public and their competitors.<sup>65</sup> Information about networks, equipment deployment, traffic flow, and business strategies would give competitors insights into the outage report filers’ businesses providing a competitive advantage they would not normally have.<sup>66</sup> Again, these comments support our prior conclusion in the *Part 4 Rules* proceeding there would be a “likelihood of substantial competitive harm from the disclosure of outage reports to competitors.”<sup>67</sup> MSNBC argues that the competitive harm in an Exemption 4 analysis must be measured by the use of confidential information “by competitors.”<sup>68</sup> We do not disagree, but as we have explained, the filers’ competitors would gain access to internal information that could easily be used to the competitive disadvantage of the filers of outage reports. Contrary to MSNBC’s suggestion,<sup>69</sup> harm from releasing these reports would flow not only from customer disgruntlement, but also from the insights into the filers’ businesses that would enable competitors to change their business strategies.<sup>70</sup>

17. Finally, it has long been established that FOIA Exemption 4 protects other governmental interests, such as compliance and program effectiveness, in addition to those protected by the impairment

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<sup>63</sup> See GCI Opp. at 1-2 (release of reports would reveal “extent of a carrier’s network, the type and location of facilities, and in some circumstances, even information about identity of customers and their usage”); EATEL Opp. at 1-2 (reports would reveal “the type of technology used by the carrier and the number of customers”); FMTC Opp. at 1-3 (reports would reveal number of lines, traffic flows, amount of traffic, type of equipment, recovery plans, and future business negotiation positions); MSV Opp. at 3 (release of outage reports would reveal “amounts of traffic or users on MSV’s system at any particular time”).

<sup>64</sup> CTIA Opp. at 2, 8-9 (releasing outage reports would “forcibly reveal[] competitors’ business strategies and their successes and failures;” and would “describe[e] companies’ exact market conditions”); see also NCTA Opp. at 4 (outage reports would reveal information that would permit competitors to “target[] particular geographic areas for special services or marketing efforts”).

<sup>65</sup> See CTIA Opp. at 9 (“no comparable information exists in the public domain”); AT&T at 14 (“This is the type of information that is not ordinarily revealed publicly by competitive firms and would not be revealed voluntarily by AT&T, especially if that information would become available to a competitor” (emphasis in original)).

<sup>66</sup> We note that parties asserted that release of the reports would also violate the Trade Secrets Act, 18 U.S.C. § 1805. As we are withholding the reports pursuant to Exemption 4, we need not reach this issue.

<sup>67</sup> *Part 4 Rules*, 19 FCC Rcd at 16854.

<sup>68</sup> AFR at 3.

<sup>69</sup> AFR at 3.

<sup>70</sup> The case cited by MSNBC (AFR at 3 & n.9), *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983), does not demand a different result. MSNBC cites that case for the proposition that the “important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from affirmative use of proprietary information by competitors.” In that case, the D.C. Circuit upheld the lower court’s conclusion that competitive harm would result from the release of the records concerning clinical studies of the safety and efficacy of intraocular lenses. *Id.*, at 1291. The court noted (*id.*) that “evidence revealing ‘[a]ctual competition and the likelihood of substantial competitive injury’ is sufficient to bring commercial information within the realm of confidentiality. *Gulf & Western Industries v. United States*, 615 F.2d [527,] 530 [(D.C. Cir. 1979)].” Here, the carriers that submitted the outage reports have not only demonstrated the existence of competition but also the likelihood of substantial competitive injury from their competitors if the reports were released. See paragraph 16 citing NCTA Opp. at 5; USTelecom Opp. at 3-4; CTIA Opp. at 2, 8-9; MSV Opp. at 3; Dobson Opp. at 2-3; Syniverse Opp. at 2-3; GCI Opp. at 1-2; EATEL Opp. at 1-2; TDS Opp. at 1; ACS Opp. at 4-5; Farmers Opp. at 1-3; Sprint Opp. at 2; Verizon Opp. at 3-4; AT&T Opp. at 14-15.

and competitive harm prongs of Exemption 4.<sup>71</sup> MSNBC does not challenge, and in any event the record here amply supports, our conclusion in the *Part 4 Rules* that release of the reports could aid those seeking to do harm to our country.<sup>72</sup> As the Department of Homeland Security (DHS) observed in the *Part 4 Rules* proceeding, the network outage reports

include information concerning the direct and root cause(s) and duration of the disruption; the range and types of services affected; the scope and gravity of the impact across all platforms and geographic area; specific equipment failures; the specific network element(s) impacted; remedial measures and/or best practices applied; and an appraisal of the effectiveness of the best practices. While this information is critical to identify and mitigate vulnerabilities in the system, it can equally be employed by hostile actors to identify vulnerabilities for the purpose of exploiting them.<sup>73</sup>

Based on DHS's comments, we concluded in the *Part 4 Rules*:

[T]he national defense and public safety goals that we seek to achieve by requiring these outage reports would be seriously undermined if we were to permit these reports to fall into the hands of terrorists who seek to cripple the nation's communications infrastructure. In addition, release of this information could also make regulated entities less forthright in the information submitted to the Commission at a time when it is especially critical that we obtain full and accurate information in order to prevent harm to the communications infrastructure.<sup>74</sup>

As we have explained, both here and in the *Part 4 Rules*, the purpose of the outage report program is the safeguarding our nation's critical infrastructure. However, public release of the reports would have the opposite effect by making the reports available to those who would do harm to our nation. For these reasons, we conclude that the public release of the outage reports would impair the effectiveness of the outage reporting program. We therefore withhold the reports also under the third prong of Exemption 4 which, among other things, protects the confidentiality of information where disclosure would undermine the effectiveness of governmental programs.

18. MSNBC argues that there is a strong public interest in making the reports available to the public, stressing the consumer interest in the information contained in the reports.<sup>75</sup> However, MSNBC

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<sup>71</sup> See, e.g., *Critical Mass*, 975 F.2d at 879 (Exemption 4 "also protects a governmental interest in administrative efficiency and effectiveness"); *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 286 (D.C. Cir. 1987) citing *9 to 5 Org. for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1, 11 (1st Cir. 1983) (proper inquiry is whether disclosure would harm "an identifiable private or governmental interest which the Congress sought to protect by enacting [E]xemption 4"); *National Parks*, 498 F.2d at 770 n.17 (suggesting existence of more than competitive harm and impairment prongs of Exemption 4).

<sup>72</sup> See USTelecom Opp. at 4-5; MSV Opp. at 3; Dobson Opp. at 3; GCI Opp. at 2; EATEL Opp. at 3; TDS Opp. at 1; ACS Opp. at 6; FMTC Opp. at 1, 4-5; Sprint Opp. at 2-3 & n.4; Global Crossing Opp. at 1; Verizon Opp. at 4-5

<sup>73</sup> Comments of the Department of Homeland Security, ET Docket No. 04-35 (the *Part 4 Rules* proceeding) (June 2, 2004), at 14 (footnote omitted), quoted by USTelecom Opp. at 4.

<sup>74</sup> *Part 4 Rules*, 19 FCC Rcd at 16855.

<sup>75</sup> See AFR at 4.

misapprehends the nature of the outage reports when it argues that “[d]ropped cell phone calls, and general frustration with cell phone performance, is frequently at the top of consumer complaints received by the Federal Trade Commission. Consumers have very little way of knowing how reliable their cell phones will be prior to purchase; there is precious little data available concerning mobile network performance.”<sup>76</sup> The outage reports will not, contrary to MSNBC’s suggestion, provide this type of information.<sup>77</sup> Rather, outage reports “contain highly technical information on network infrastructure outages” and “do not contain information on the number of dropped calls and quality of service information for consumers of wireless telephone services.”<sup>78</sup>

19. Neither of the two cases cited by MSNBC demands a different result.<sup>79</sup> In *Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990) (*Teich*), the court found that disclosure of research data concerning silicone gel breast implants was “unquestionably in the public interest” and outweighed the “marginal commercial benefit” and “negligible competitive harm” to the submitter of the information.<sup>80</sup> Similarly, in *GC Micro Corp. v. Defense Logistics Agency*, 33 F. 3d 1109, 1115 (9th Cir. 1994), the court found the “strong public interest in favor of disclosure” outweighed a “questionable” showing of “any potential for competitive harm, let alone *substantial* harm.”<sup>81</sup> Here, in contrast to the cases relied upon by MSNBC, numerous submitters of the outage reports have demonstrated that substantial competitive harm would result from the release of the reports. In addition, disclosure would impair the government’s access to complete and accurate outage data. Further, disclosure might impair vital homeland security programs by disclosing network vulnerabilities to potential wrongdoers. Each of these reasons would independently justify withholding the outage data. Additionally, the public benefit in releasing these reports is small because the network outage reports simply do not contain the type of consumer information that MSNBC references to argue in favor of release. As a result, we conclude that the public interest in the release of individual outage reports does not outweigh the strong competitive harm demonstrated on this record, the impairment of our ability to obtain the information from carriers subject to our rules or the detrimental impact release would likely have upon homeland security.<sup>82</sup>

### III. ORDERING CLAUSE

20. The application for review by MSNBC Interactive LLC, is DENIED. MSNBC may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B).

<sup>76</sup> AFR at 4.

<sup>77</sup> See Sprint Opp. at 4.

<sup>78</sup> See Letter from Lisa Fowlkes, Deputy Bureau Chief, PSHSB, to the 15 FOIA Requesters (Feb. 27, 2007), n. 20, *supra* at 1.

<sup>79</sup> AFR at 4.

<sup>80</sup> *Teich*, 243 F. Supp. at 253 (only commercial benefit from non-disclosure was that other manufacturers might continue to blindly put out hazardous products).

<sup>81</sup> *GC Micro*, 33 F.3d at 1115 (emphasis in original) (data on percentage and amount subcontracted to small and disadvantaged businesses would provide little if any help in trying to undercut contractors’ bids).

<sup>82</sup> Because we conclude that Exemption 4 applies, we need not determine whether FOIA Exemptions 2 and 7, 5 U.S.C. § 552(b)(2) and (7), also apply. See *L.A. Times Communications, LLC v. Dep’t of the Army*, 442 F. Supp.2d 880, 900, 902 (C.D. Cal. 2006) (protecting names of private security contractors in Iraq under Exemptions 2 and 7(F)); *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321-22 (D. Utah 2003) (withholding maps of flooding likely to result from damage to Hoover Dam or Glen Canyon Dam under FOIA Exemption 7(F)); *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 964-65 (C.D. Cal.) (protecting cargo container inspection data under Exemption 2), *recon. den.*, 272 F. Supp. 2d at 966-68 (C.D. Cal. 2003), *app. dismissed voluntarily*, No. 03-55833 (9th Cir. Aug. 26, 2003).

21. The following Commissioners are responsible for this decision: Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary