

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	FOIA Control Nos. 2006-474, 2007-081,
	)	2007-082, 2007-083, 2007-084, 2007-085,
Freedom of Information Act Requests	)	2007-086, 2007-087, 2007-088, 2007-089,
For Network Outage Reporting	)	2007-090, 2007-091, 2007-094, 2007-112
Information	)	

**OPPOSITION OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA), on behalf of its members, hereby objects to the release of the information requested in the above-referenced Freedom of Information Act (FOIA) requests.

**I. INTRODUCTION**

NCTA is the principal trade association for the cable television industry. NCTA represents cable operators serving more than 90 percent of the nation's cable television households. The cable industry is the nation's largest broadband provider of high-speed Internet access and cable operators provide telephone service to millions of American homes.

The Commission requires telecommunications providers, including cable operators that provide circuit-switched telephony service, to report certain network outages.<sup>1</sup> The above-referenced FOIA requests seek information provided to the Commission under these rules. In FOIA Request No. 2006-474, MSNBC Interactive News (MSNBC) requested records entered into the Commission's Network Outage Reporting System (NORS) during the most recent 24-

---

<sup>1</sup> 47 C.F.R. § 4.9.

month period. This request was rejected by the Office of Engineering and Technology (OET).<sup>2</sup> MSNBC filed an application for review, which remains pending.<sup>3</sup> MSNBC's request includes records that may have been submitted by NCTA's members and therefore NCTA has an interest in this proceeding.

In FOIA Request Nos. 2007-091, 2007-094, 2007-112, individuals have requested information similar in scope to that requested by MSNBC. Consequently, NCTA has an interest in the resolution of these requests. The remaining requests seek outage information filed by wireless carriers. Many of NCTA's members are planning to provide wireless services in the future and therefore we have an interest in the resolution of these requests as well. According to a notice from Commission staff, MSNBC's pending application for review and all of these other requests will be considered as a group.<sup>4</sup>

As we explain below, the information the Commission requires under the outage reporting rules is competitively sensitive, and any companies that submitted information pursuant to these rules did so with an expectation that it would be kept confidential by the Commission. The requesting parties have provided no basis for the Commission to reverse course. Accordingly, NCTA requests that the Commission deny the application for review and reject the other pending requests.

---

<sup>2</sup> See Letter from Julius P. Knapp, Acting Chief, Office of Engineering and Technology, to Bob Sullivan, MSNBC, FOIA Control No. 2006-474 (Sept. 19, 2006) (OET Letter).

<sup>3</sup> Review of Freedom of Information Action of MSNBC Interactive News, LLC, FOIA Control No. 2006-474 (filed Oct. 16, 2006) (MSNBC Application for Review).

<sup>4</sup> See Letter from Jeffrey Goldthorp, Public Safety and Homeland Security Bureau (January 11, 2007). This letter also stated that FOIA Request No. 2007-115 would be included in this group. In that request, Neutral Tandem, a competitive provider of tandem services, seeks aggregate information on outages of tandem switches. NCTA's members generally do not own tandem switches and therefore this opposition does not cover that request.

## II. THE COMMISSION SHOULD NOT DISCLOSE THE REQUESTED OUTAGE INFORMATION.

In 2004, the Commission adopted a new set of rules requiring providers of communications services to report network outages to the Commission.<sup>5</sup> For outages that exceed the threshold established by the Commission, the affected service provider must notify the Commission within two hours of the outage, file an initial report within 72 hours, and submit a final report within 30 days.<sup>6</sup> Cable operators that provide circuit-switched telephony service were among the classes of companies subject to these new requirements.<sup>7</sup>

When it adopted the new reporting requirements, the Commission recognized the need to protect the confidentiality of data submitted. Specifically, given the “competitive nature of many segments of the communications industry and the importance that outage information may have on the selection of a service provider,” the Commission found that “there is a presumptive likelihood of substantial competitive harm from disclosure of information in outage reports.”<sup>8</sup>

In rejecting FOIA Request No. 2006-474, OET appropriately relied on the Commission’s earlier conclusion that disclosure of the reported information creates a presumptive likelihood of substantial competitive harm.<sup>9</sup> The Commission’s finding in 2004 tracks the language used by the courts in interpreting FOIA Exemption 4, which protects “trade secrets and commercial or financial information obtained from a person [that is] privileged and confidential.”<sup>10</sup>

---

<sup>5</sup> *New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830 (2004) (*Outage Reporting Order*).

<sup>6</sup> *Id.* at 16870-72, ¶¶ 73-75.

<sup>7</sup> The Commission did not address VoIP services provided by cable operators in this order. *Id.* at 16891, ¶ 117.

<sup>8</sup> *Id.* at 16855, ¶ 45.

<sup>9</sup> OET Letter at 1.

<sup>10</sup> 5 U.S.C. § 552(b)(4).

Specifically, when the federal government requires a party to provide information, as is the case here, the information is considered confidential for purposes of FOIA Exemption 4 if its disclosure is likely to “cause substantial harm to the competitive position of the person from whom the information was obtained” or “impair the Government’s ability to obtain necessary information in the future.”<sup>11</sup>

MSNBC argues in its Application for Review that any harm caused by disclosure of outage reports is not competitive harm for purposes of FOIA Exemption 4, but rather harm from “consumers choosing to seek out better carriers.”<sup>12</sup> MSNBC’s argument is based on an erroneous interpretation of the law. Specifically, the one case it relies on – *GC Micro Corp. v. Defense Logistics Agency* – found that FOIA Exemption 4 was inapplicable because the information submitted to the government was not specific enough to be helpful to competitors.<sup>13</sup>

That is certainly not the case with outage reports, which include information that undoubtedly would be useful to competitors, both in undercutting the reputation of a competing service provider and in targeting particular geographic areas for special services or marketing efforts. As one court recently explained, if “a competitor could use the information to gain a competitive advantage,” it follows that “disclosure of this information would likely cause substantial competitive injury to the companies that submitted the information.”<sup>14</sup> That standard

---

<sup>11</sup> *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 903 (D.C. Cir. 1999) (quoting *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

<sup>12</sup> MSNBC Application for Review at 3.

<sup>13</sup> *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9<sup>th</sup> Cir. 1994) (“The data at issue therefore would provide little if any help to competitors attempting to estimate and undercut the contractors’ bids.”)

<sup>14</sup> *Gilda Industries v. U.S. Customs and Border Protection Bureau*, 457 F. Supp. 2d 6, 11 (D.D.C. 2006); *see also Lion Raisins Inc. v. USDA*, 354 F.3d 1072, 1081 (9<sup>th</sup> Cir. 2004) (distinguishing *GC Micro* in case where information requested would be valuable to competitors).

is satisfied here, and consequently the Commission should affirm OET's decision and reject all the other pending requests for outage reporting information.

In addition, the information should be considered confidential for purposes of FOIA Exemption 4 because disclosure would impair the government's ability to obtain the necessary information in the future. In adopting the reporting rules, the Commission noted that the information it was collecting could be used by parties that seek to "cripple the nation's communications infrastructure."<sup>15</sup> Although the Commission could avoid the potentially grave consequences associated with disclosure by collecting less detailed information, that approach might undermine the Commission's homeland security agenda.<sup>16</sup> Accordingly, the better course is to deny the FOIA requests and preserve the confidentiality of network outage reporting data.

---

<sup>15</sup> *Outage Reporting Order*, 19 FCC Rcd at 16855, ¶ 45.

<sup>16</sup> *Id.* at 16833, ¶ 1 (recognizing a "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.")

### **III. CONCLUSION**

For all the reasons explained herein, the Commission should affirm OET's denial of FOIA Request No. 2006-474 and reject the other pending requests for network outage reporting information.

Respectfully submitted,

Daniel L. Brenner  
Steven F. Morris  
Counsel for the National Cable &  
Telecommunications Association  
25 Massachusetts Avenue, N.W. - Suite 100  
Washington, DC 20001-1431

January 22, 2007

## SERVICE LIST

I, Gretchen M. Lohmann, a secretary with the National Cable & Telecommunications Association, hereby certify that a copy of the foregoing Oppositions was served via electronic mail on this 22<sup>nd</sup> day of January, 2007, to the following:

Jeffrey Goldthorp  
Chief, Communications Systems Analysis Division  
Public Safety and Homeland Security Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Jeffrey.goldthorp@fcc.gov](mailto:Jeffrey.goldthorp@fcc.gov)

**FOIA Control No. 2006-474**

Bob Sullivan  
MSNBC Interactive, LLP  
1 Microsoft Way  
Redmond, WA 98052  
[Bob.sullivan@msnbc.com](mailto:Bob.sullivan@msnbc.com)

Teri A. Ciancola, Esq.  
Microsoft Corporation  
One Microsoft Way  
Redmond, WA 98052  
c/o [amcam@microsoft.com](mailto:amcam@microsoft.com)

**FOIA Control No. 2007-081**

Maris Cuneo  
27 Old Hattertown Road  
Redding, CT 06896  
[whiteotree@aol.com](mailto:whiteotree@aol.com)

**FOIA Control No. 2007-082**

Giles E. Meharg  
7536 Rolling River Pkwy  
Nashville, TN 37221  
[scraighe@bellsouth.net](mailto:scraighe@bellsouth.net)

**FOIA Control No. 2007-083**

Bladen Brannon  
1037 Brookhaven Walk NE  
Atlanta, GA 30319  
[Bladen.brannon@gmail.com](mailto:Bladen.brannon@gmail.com)

**FOIA Control No. 2007-084**

Gregory T. Garten  
11005 Cedarcrest Way  
San Diego, CA 92121  
[ggarten@surfdoggie.org](mailto:ggarten@surfdoggie.org)

**FOIA Control No. 2007-085**

John Maurer  
6358 Delmar Blvd  
Suite 200  
St. Louis, MO 63130  
[John.maurer@riverfronttimes.co](mailto:John.maurer@riverfronttimes.co)

**FOIA Control No. 2007-086**

William Farrell  
5652 Fordham Circle  
Canton, MI 48187  
[Nowandever29@yahoo.com](mailto:Nowandever29@yahoo.com)

**FOIA Control No. 2007-087**

Matthew Brown  
7700 Majestic Mountain Road  
Flagstaff, AZ 86004  
[gjoegeneralbrow@hotmail.com](mailto:gjoegeneralbrow@hotmail.com)

**FOIA Control No. 2007-088**

Alan Hawkins  
3 Pecan Pass Way  
Ocala, FL 34472  
[screenoscar@yahoo.com](mailto:screenoscar@yahoo.com)

**FOIA Control No. 2007-089**

Piotr Mitros  
379a Cardinal Mediros Avenue  
#6  
Cambridge, MA 02141  
[pmitros@mit.edu](mailto:pmitros@mit.edu)

**FOIA Control No. 2007-090**

Michael Rose  
822 Guilford Avenue  
PMB 157  
Baltimore, MD 21202  
[mikerose@gmail.com](mailto:mikerose@gmail.com)

**FOIA Control No. 2007-091**

Ilan Rabinovitch  
PO Box 18351  
Encino, CA 91416  
[ilan@fonz.net](mailto:ilan@fonz.net)

**FOIA Control No. 2007-094**

Kevin L. Bardon  
108 Champagne Drive  
Huntsville, AL 35811  
[Kevin.Bardon@UAH.edu](mailto:Kevin.Bardon@UAH.edu)

**FOIA Control No. 2007-112**

Kelly Rice  
100 Wood Ridge Center Drive  
Charlotte, NC 28217  
[krice@wncn.com](mailto:krice@wncn.com)

**FOIA Control No. 2007-115**

Gerard Laurain  
c/o Neutral Tandem  
1 S. Wacker Drive  
Chicago, IL 60606  
[glaurain@neutraltandem.com](mailto:glaurain@neutraltandem.com)

---

Gretchen M. Lohmann