UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AT&T INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	No. 08-4024

MOTION OF AT&T INC. FOR STAY PENDING JUDICIAL REVIEW

Wayne Watts
Paul K. Mancini
AT&T INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

Gary L. Phillips
Terri Hoskins
AT&T INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2055

Colin S. Stretch
Kelly P. Dunbar
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Counsel for AT&T Inc.

September 25, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, AT&T Inc. submits the following corporate disclosure statement:

AT&T Inc. has no parent company. No publicly held company owns 10 percent or more of AT&T Inc.'s stock.

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INTRODUCTION AND SUMMARY

Pursuant to Federal Rule of Appellate Procedure 18, AT&T Inc. ("AT&T") requests a stay of the *Order*[1] pending judicial review. In the *Order*, respondent the Federal Communications Commission ("FCC" or "Commission") ruled that certain confidential documents belonging to AT&T are subject to disclosure under the Freedom of Information Act ("FOIA"), and it ordered disclosure of those documents to a trade organization (CompTel) that represents the interests of AT&T's competitors.

A stay is warranted, first, to preserve AT&T's right to judicial review of the *Order*. The FCC made clear that, absent a request for a judicial stay, it would promptly release AT&T's records. That step would likely moot AT&T's appeal. The law is clear that, in such circumstances, a stay is warranted. *See, e.g.*, *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, Circuit Justice) ("When . . . the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted.") (internal quotation marks omitted).

A stay is also warranted under the traditional standards governing interim relief. The *Order* concluded that AT&T, because it is a corporation, may not claim

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[1] Memorandum Opinion and Order, *SBC Communications Inc. On Request for Confidential Treatment*, FCC 08-207 (rel. Sept. 12, 2008) ("*Order*") (Attach. A hereto). The *Order* refers to petitioner as SBC Communications Inc. ("SBC"). In November 2005, SBC acquired AT&T Corp. and changed its name to AT&T Inc. Petitioner is referred to herein as "AT&T."

the protections of FOIA Exemption 7(C), which protects from disclosure "records or information compiled for law enforcement purposes" when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C). The FCC's conclusion that corporations are categorically excluded from the protection of that provision conflicts with the text and purpose of the statute as well as precedent interpreting and applying an analogous exemption. AT&T's appeal of the *Order* is thus likely to succeed on the merits.

The balance of equities likewise favors a stay. In addition to the harm that would result from frustrating AT&T's right to judicial review, disclosure of AT&T's confidential documents would injure the company's reputation and goodwill, which constitutes irreparable harm under established law. Nor is there any interest in immediate disclosure that could justify mooting AT&T's appeal. The records at issue belong to AT&T and reveal information only about AT&T; they are in the possession of the FCC (and therefore subject to the FOIA) only through the happenstance of a law-enforcement investigation. As the Supreme Court has made clear, there is no public interest *at all* in the disclosure of such records. It follows that there is no public-interest harm in delaying disclosure for the short time necessary to permit judicial review.

For these and other reasons set forth below, the Court should stay the *Order* pending judicial review.

BACKGROUND

A. In August 2004, AT&T voluntarily informed the FCC of concerns regarding certain invoices related to the federal universal service program that supports advanced telecommunications in schools and libraries. AT&T's disclosure explained that its Connecticut subsidiary had submitted arguably improper invoices to the universal service fund administrator relating to services performed for the New London, Connecticut public schools. AT&T noted that it had refunded all amounts collected pursuant to the questionable invoices and had cancelled all outstanding invoices that raised similar concerns. In response, the FCC initiated an investigation, which was resolved in a consent decree that involved no admission of wrongdoing. *See* Order and Consent Decree, *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004).

In the course of its investigation, the FCC ordered AT&T to produce, and AT&T did produce, a wide range of documents. These documents include detailed written responses to FCC interrogatories; names and job descriptions of AT&T employees involved in the arguably improper billing; completed universal service fund invoice forms; more than 75 pages of internal AT&T emails (including documents attached to the emails) that provide cost, pricing, and billing information in connection with the services provided to New London public schools and that indicate how AT&T came to invoice the universal service fund for

certain aspects of those services; AT&T billing invoices and maintenance orders; invoices provided from AT&T's vendors for work performed for AT&T; descriptions and pricing information of telecommunications products and services that AT&T's subsidiaries provide to schools and libraries in Connecticut and elsewhere; AT&T's Code of Business Conduct; and AT&T's view as to whether and the extent to which its employees had violated that code of conduct. *See* Declaration of Leslie A. Bowman ¶ 6 ("Bowman Decl.") (Attach. B hereto).

B. On April 4, 2005, CompTel, a trade association representing competitive local exchange carriers with a long history of antagonism toward AT&T, submitted a one-sentence FOIA request demanding the contents of the FCC's investigative file. Three days after being notified of CompTel's request, AT&T submitted a letter opposing disclosure. AT&T explained that the documents it had produced to the agency had been "compiled for law enforcement purposes" and were protected from disclosure under the FOIA's law-enforcement exemption (Exemption 7(C)), *see* 5 U.S.C. § 552(b)(7)(C).[2]

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[2] AT&T's opposition also explained that the documents included competitively sensitive information that was protected from disclosure under the FOIA's exemption for confidential commercial information (Exemption 4), *see* 5 U.S.C. § 552(b)(4). The FCC subsequently redacted the documents in question in part on the basis of Exemption 4. CompTel challenged those redactions – as well as the FCC's invocation of the FOIA's deliberative-privilege exemption (Exemption 5) to protect non-AT&T documents in the file – in the United States District Court for the District of Columbia. *See* Complaint for Declaratory and Injunctive Relief, *CompTel v. FCC*, No. 1:06-cv-01718 (HHK) (D.D.C. filed Oct. 5, 2006). That

On August 5, 2005, the FCC's Enforcement Bureau rejected AT&T's reliance on Exemption 7(C) with the cursory statement that, "[g]enerally, businesses do not possess 'personal privacy' interests as required for application" of that exemption.[3]

AT&T sought review by the Commission. On September 12, 2008, the FCC denied AT&T's appeal and ordered disclosure of AT&T's confidential records. The FCC concluded, as a categorical matter, that a corporation does not have "'personal privacy' interests within the meaning of Exemption 7(C)." *Order* ¶ 7. According to the FCC, "Exemption 7(C) does not cover a corporation's 'privacy interest,' since a corporation's interests are of necessity business interests." *Id.*[4] The *Order* further stated that the FCC would disclose AT&T's records to CompTel unless AT&T "s[ought] a judicial stay" by September 26, 2008. *Id.* ¶ 12.[5]

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case remains pending; the FCC's application of Exemptions 4 and 5 are not at issue here.

[3] *See* Letter from William H. Davenport, Enforcement Bureau, FCC, to Jim Lamoureux, SBC Services, Inc., and Mary C. Albert, CompTel, FOIA Control No. 2005-333, at 6 (Aug. 5, 2005).

[4] Although the *Order* faults AT&T for failing to request confidential treatment of its records at the time they were submitted, the FCC did not deny AT&T's application for review or otherwise order disclosure on that basis. *See Order* ¶ 6 ("[W]e have considered the information and arguments subsequently submitted by [AT&T] on our own motion.").

[5] AT&T requested a stay from the FCC on September 23 and indicated that, absent relief from the agency, AT&T would seek a judicial stay on September 26. The FCC has taken no action on AT&T's request for stay. *See* Fed. R. App. P. 18(a)(2)(A)(ii).

DISCUSSION

I. A STAY IS NECESSARY TO PRESERVE AT&T'S RIGHT TO JUDICIAL REVIEW

Paragraph 12 of the *Order* made clear that, absent a stay, the FCC intends to disclose AT&T's confidential documents. That step would vitiate AT&T's right of appeal. As the D.C. Circuit explained in analogous circumstances, "once the putatively protected material is disclosed, the very right sought to be protected has been destroyed." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (per curiam) (holding that disclosure order of district court is final for purpose of appeal) (internal quotation marks and brackets omitted). In other words, once "the government . . . let[s] the cat out of the bag," there is no "effective way of recapturing it" if the disclosure order is "ultimately found to be erroneous." *Irons v. FBI*, 811 F.2d 681, 683-84 (1st Cir. 1987) (same); *see also Sterling v. United States*, 798 F. Supp. 47, 48 (D.D.C. 1992) (FOIA case; once a record has been released, "there are no plausible factual grounds" to resist disclosure), *aff'd*, No. 93-5264, 1994 WL 88894 (D.C. Cir. Mar. 11, 1994).

Such circumstances plainly warrant issuance of a stay: "When . . . 'the normal course of appellate review might otherwise cause the case to become moot,' issuance of a stay is warranted." *Garrison*, 468 U.S. at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, Circuit Justice)

(granting stay in FOIA case where court of appeals ordered disclosure of government document containing allegedly sensitive material); *accord Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1182 (8th Cir. 2000) (noting that district court had issued preliminary injunction in FOIA case to prevent disclosure of records pending review); *cf. Nowak v. Lexington Ins. Co.*, No. 05-21682CIV-MORENO, 2006 WL 3613760, at *2 (S.D. Fla. June 22, 2006) (granting stay to allow judicial review of order requiring disclosure; even though party was not "likely to prevail on the merits," a stay was necessary because, once the other party "reviews those documents, the cat is out of the bag").

Indeed, insofar as failure to issue a stay would result in disclosure of AT&T's documents and thereby frustrate AT&T's ability to secure judicial review, it would countermand the basic "presumption that agency action is judicially reviewable." *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007). A stay is warranted for this reason alone.

II. A STAY IS WARRANTED UNDER TRADITIONAL STANDARDS GOVERNING INTERIM RELIEF

Even apart from the prospect of frustrating AT&T's right of review, a stay is warranted because AT&T's appeal is likely to succeed on the merits and because the balance of interests favors interim relief. *See Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (per curiam) (identifying likelihood of success on the merits and balance of interests as factors

to evaluate in determining whether to stay agency order pending appeal) (citing *Susquenita Sch. Dist. v. Raelee*, 96 F.3d 78, 80 (3d Cir. 1996); *In re Penn Cent. Transp. Co.*, 457 F.2d 381, 384-85 (3d Cir. 1972), *aff'd in part*, 373 F.3d 372 (3d Cir. 2004)).

A. AT&T's Petition for Review is Likely to Succeed on the Merits

The FOIA's statutory exemptions "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52 (1989). The *Order*'s conclusion that corporations are categorically outside the scope of Exemption 7(C) is out of keeping with this basic principle: it conflicts with the text and purposes of the statute and runs counter to precedent. AT&T's challenge to the *Order* is accordingly likely to succeed on the merits.

1. Exemption 7(C) protects from disclosure records or information (1) "compiled for law enforcement purposes," (2) "to the extent that . . . production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). With respect to the first requirement, CompTel's FOIA request sought the records that AT&T provided to the FCC, in response to a direct request from the agency, in connection with the FCC's law-enforcement investigation into AT&T's compliance with universal service regulations. The requested records were plainly "compiled for law enforcement purposes." *Id.* § 552(b)(7); *see, e.g., Rugiero v. United States Dep't of Justice*, 257

F.3d 534, 550 (6th Cir. 2001) (Exemption 7 applies to "records compiled for civil enforcement purposes"). The *Order* does not dispute the point.

The question in dispute, rather, is whether disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). On this question, the Commission ruled categorically that AT&T, as a corporation, is foreclosed from invoking the protections of Exemption 7(C). *See Order* ¶ 7 ("Exemption 7(C) does not cover a corporation's "privacy interest," since a corporation's interests are of necessity business interests.").

That ruling is contrary to the statutory text. "[T]he concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 165 (2004) (citation omitted). Instead, "Exemption 7(C) protects a broad notion of personal privacy." *Carpenter v. United States Dep't of Justice*, 470 F.3d 434, 438 (1st Cir. 2006). Contrary to the Commission's understanding, that "broad notion" includes the privacy interests of corporations.

Congress defined a "person" in the FOIA to include "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). Indeed, FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from *a person*," *id.* § 552(b)(4) (emphasis added), has long been held to apply to corporations, *see*,

e.g., *Judicial Watch, Inc. v. United States Dep't of Justice*, 306 F. Supp. 2d 58, 67-68 (D.D.C. 2004).

Furthermore, the privacy protections of the Privacy Act of 1974, 5 U.S.C. § 552a, extend only to "individuals," *see* 5 U.S.C. § 552a(a)(2), which *excludes* "corporations or sole proprietorships," *St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981). "In choosing the word 'individual' as the object of the Privacy Act's protections, Congress demonstrated its awareness and preference for the narrower scope of that term, rather than the broader scope of the term 'person' to which the FOIA applies." *Florida Med. Ass'n v. Department of Health, Educ. & Welfare*, 479 F. Supp. 1291, 1307 (M.D. Fla. 1979). Indeed, Congress used "person" and "individual" in the Privacy Act simultaneously, confirming that Congress understood the distinction between the two. *See, e.g.*, 5 U.S.C. § 552a(b) ("[n]o agency shall disclose any record . . . to any *person*, or to another agency, except pursuant to a written request by, or with the prior written consent of, the *individual* to whom the record pertains") (emphases added). That Congress used the term "person," not "individual," in the FOIA is compelling evidence that Congress did not intend to exclude corporations from its scope. *See, e.g.*, *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

That Exemption 7(C) uses the adjectival form of the word "person" – that is, "personal" – does not suggest a different result. "Personal" is defined simply as "[o]f or pertaining to a particular *person*." *E.g.*, *American Heritage Dictionary* 925 (2d ed. 1991) (emphasis added). Indeed, it is a "grammatical imperative[]" that "a statute which defines a noun has thereby defined the adjectival form of that noun." *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 623 (3d Cir. 2006) (Fisher, J., concurring). Because Congress defined "person" to include a corporation, it follows that "the adjectival form of that noun" – *i.e.*, "personal" – likewise includes a corporation. *See id.* Moreover, the word "personal," no less than "person," can be and often is used to refer to corporations.[6] And, as discussed below, *see infra* pp. 17-18, corporations have long been held to possess various "privacy" interests, further confirming that the term "personal privacy" in Exemption 7(C) encompasses corporations.

2. The FCC's decision categorically to exclude corporations from Exemption 7(C) conflicts not only with the text of the exemption, but also with its purpose.

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[6] For example, corporations have long been understood to be "persons" for the purposes of the Fifth and Fourteenth Amendments, *see*, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936), and therefore protected by the doctrine of "personal" jurisdiction that inheres in the concept of due process, *see*, *e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 110 (1987) (plurality); 28 U.S.C. § 1391(c) ("a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction").

Exemption 7(C) reflects Congress's judgment that "[s]uspects, interviewees and witnesses have a privacy interest because disclosure [of requested information] may result in embarrassment or harassment." *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1058 (3d Cir. 1995); *see Voinche v. FBI*, 940 F. Supp. 323, 331 (D.D.C. 1996) (Exemption 7(C) "is designed to protect . . . against . . . the stigma frequently attached to law enforcement proceedings and investigations"), *aff'd*, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997) (per curiam). Exemption 7(C) thus serves an instrumental purpose: it protects the privacy of parties participating in law-enforcement investigations – whether as suspects or cooperating parties – because the unwarranted disclosure of information pertaining to those investigations may be used to embarrass, harass, or stigmatize them.

That purpose applies to corporations. Corporations, like individuals, are routinely suspects or cooperating parties (or both) in law-enforcement investigations. And corporations, like individuals, face the prospect of public embarrassment, harassment, and stigma resulting from their involvement in such investigations.[7] That is precisely the case with respect to disclosure of AT&T's

[7] *See* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489, 492 (1999) (citing study showing that "publicly traded corporations sustained substantial losses in goodwill when named as targets of [Federal Trade Commission] investigations for having possibly violated its regulations against false and misleading advertising"); Ken Brown *et al.*, *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question – Obstruction of Justice Count May Speed the Departure of*

documents. *See* Bowman Decl. ¶¶ 7-12. The FCC's focus on "literal embarrassment" (*Order* ¶ 8) thus misses the point: the exemption is designed to protect against any type of harassment or stigma that might result from disclosure of information that has been collected pursuant to a law-enforcement investigation.

Indeed, a cramped view of the scope of Exemption 7(C) could chill voluntary cooperation by corporations and other non-natural persons in law-enforcement investigations. Exemption 7 is the only FOIA exemption designed to ensure that law enforcement agencies are not "hindered in their investigations." *John Doe Agency*, 493 U.S. at 156; *see Abramson*, 456 U.S. at 630 ("[n]o other provision of FOIA could compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure"). Corporations, deprived of the protections of Exemption 7(C), may be less willing to cooperate and turn over documents in agency investigations if such documents can, as the FCC held, be made public based on nothing more than a one-sentence FOIA request.

Nor is it the case that construing Exemption 7(C) to include corporations means that corporate privacy interests must necessarily be given the same weight

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Clients and Partners – Firm Calls It "Death Penalty", Wall St. J., Mar. 15, 2002, at A1 ("In the 212-year history of the U.S. financial markets, no major financial-services firm has ever survived a criminal indictment."); *cf.* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319, 332 (1996) ("[c]orporations convicted of crimes may well suffer significant reputational losses").

as the privacy interests of individuals. Under Exemption 7(C), when the party requesting the documents establishes a threshold legitimate public interest in disclosure, *see Favish*, 541 U.S. at 172, courts "balance" that public interest against the "privacy interests that are at stake." *E.g.*, *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996). Such a balancing approach can take account of any relevant differences between corporations and individuals with respect to the privacy interests implicated by disclosure; the flexibility of such a balancing test confirms that the FCC's categorical exclusion of corporations from Exemption 7(C) is unnecessary and inappropriate.

3. The FCC's categorical exclusion of corporations from the protections of Exemption 7(C) also conflicts with precedent.

In *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), the D.C. Circuit construed FOIA Exemption 6 – which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of *personal privacy*," 5 U.S.C. § 552(b)(6) (emphasis added) – to protect the privacy interests of corporations. There, the Food and Drug Administration ("FDA"), citing FOIA Exemption 6, had withheld information relating to "private individuals *and companies* who worked on the approval" of a controversial drug. 449 F.3d at 152 (emphasis added). Judicial Watch argued that such information

could not be withheld because it was not "'about an individual.'" *Id.* The D.C. Circuit rejected that "crabbed reading of the statute," noting that the Supreme Court has instructed that the privacy interests protected by the FOIA should be construed "broadly." *Id.* The court explained that the privacy interests at stake under the FOIA "vary depending on . . . context" and that, in that case, disclosure of information about "persons *and businesses* associated with [the drug]" risked retaliation against those persons and businesses and therefore implicated the privacy interests of the FOIA. *Id.* at 153 (emphasis added, internal quotation marks omitted). The court thus held that the FDA's withholding of documents was proper to protect private parties – including "companies" and "businesses" – "'from the injury and embarrassment that can result from the unnecessary disclosure'" of protected information. *Id.* (quoting *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982)).

Judicial Watch establishes that, contrary to the FCC's conclusion, corporations have "personal privacy" interests protected under the FOIA. Indeed, although *Judicial Watch* involved "personal privacy" under Exemption 6, the FCC itself acknowledged in the *Order* that "the relevant privacy interest covered by" Exemptions 6 and 7(C) are the same. *Order* ¶ 7 n.33 (internal quotation marks omitted). In fact, Congress provided a "*broader* degree of protection to privacy interests" under Exemption 7(C) than under Exemption 6. *Hopkins v. United*

States Dep't of Housing & Urban Dev., 929 F.2d 81, 86 (2d Cir. 1991) (emphasis added). If, as the D.C. Circuit held, the "personal privacy" interests protected by Exemption 6 extend to corporations, it follows that those same interests are protected by the "broader" protection afforded by Exemption 7(C).

Washington Post Co. v. United States Department of Justice, 863 F.2d 96, 100-01 (D.C. Cir. 1988), does not suggest a different result. *See Order* ¶ 7. There, the D.C. Circuit indicated that a corporation lacked privacy interests under Exemption 7(C) on the facts of that case, based on a reflexive application of case law interpreting Exemption 6 that the court read as excluding corporations. But the decision of the D.C. Circuit in *Judicial Watch* establishes both that the privacy protections of Exemption 6 extend to "businesses" and "companies" *and* that such entities can claim protection under the statute's purpose of protecting against the "*embarrassment* that can result from the unnecessary disclosure" of protected information. 449 F.3d at 153 (emphasis added, internal quotation marks omitted). To the extent *Washington Post* contradicts those holdings, it is outdated and unpersuasive.[8]

[8] The D.C. Circuit's recent statement that "businesses . . . do not have protected privacy interests under Exemption 6," *Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224, 1228 (D.C. Cir. 2008), was *dicta* that does not overrule the holding of *Judicial Watch*. The *Multi Ag Media* panel made that statement while addressing an issue the parties had not "contest[ed]," and in the course of concluding that information in business records was "traceable to an *individual*" and therefore within the scope of Exemption 6. *Id.* The court thus had

4. Finally, the conclusion that corporations can claim the protection of Exemption 7(C) comports with the established principle that corporations have privacy interests protected by federal law, including the Fourth Amendment. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), the Supreme Court noted that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." *Id.* at 353. But the Court found that "the intrusion into [G.M. Leasing's] privacy" at issue in that case "was not based on the nature of its business, its license, or any regulation of its activities." *Id.* at 354. Because the intrusion was instead in connection with the ordinary enforcement of the laws, the Court "[found] no justification for treating petitioner differently in these circumstances simply because it is a corporation." *Id.*

G.M. Leasing stands for two principles relevant here. First, there is nothing unusual about speaking of corporations as possessing "privacy" interests. *See id.* Second, departure from the presumption that a corporation has a privacy interest must be tied to some relevant corporate attribute that warrants differential treatment in the case at hand. Here, there is no basis to treat the documents AT&T provided to the FCC differently from documents submitted by an individual: both situations involve information provided to the government in the course of a law-

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no occasion to revisit the holding in *Judicial Watch* that corporations or businesses as such can invoke the "personal privacy" protections of Exemption 6.

enforcement investigation, and in both disclosure could lead to embarrassment, stigma, and harassment. As in *G.M. Leasing*, there is in this case "no justification for treating [AT&T] differently . . . simply because it is a corporation." *Id.*

B. The Balance of Equities Favors A Stay Pending Appeal

A stay also is warranted because AT&T would be irreparably harmed by disclosure of its documents and because there is no countervailing interest in disclosing those documents prior to completion of judicial review.

First, as explained above, absent a stay, "the normal course of appellate review might otherwise cause the case to become moot." *Garrison*, 468 U.S. at 1302 (internal quotation marks omitted). That fact alone establishes irreparable harm warranting a stay. *See supra* pp. 6-7.

Beyond that, as explained in the attached declaration, disclosure of AT&T's documents could enable "competitors or others to attempt to embarrass, harass, and stigmatize AT&T publicly by, for example, citing such information in press releases, advertisements, or news reports." Bowman Decl. ¶ 9. That embarrassment, harassment, and stigma, in turn, could harm AT&T's reputation and goodwill. *See id.* It is settled that such harm is irreparable. *See, e.g., BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 263 (3d Cir. 2000); *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005).

Nor is there is any countervailing public or private interest in immediate disclosure that would counsel against a stay pending judicial review.

First, there is no public interest *at all* in the disclosure of AT&T's documents. In the seminal decision involving Exemption 7(C) – *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) – the Supreme Court held, "as a categorical matter[,] . . . that when [a] request [for law enforcement records] seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted'" because there is no public interest in such disclosure. *Id.* at 780. The FOIA request at issue here is aimed, not at "'official information' about a Government agency," but rather at obtaining information about AT&T, contained in AT&T's *own* documents, that "the Government happens to be storing" only because AT&T brought the matter to the FCC's attention in the first place. *Id.* Under *Reporters Committee*, there is no public interest in the disclosure of those documents. Because there is no public interest in the disclosure of AT&T's documents, it follows that there is no harm to the public interest in delaying disclosure until judicial review is complete.

There is likewise no private interest in immediate disclosure that would weigh against a stay pending judicial review. Even assuming CompTel can claim a private interest in disclosure of AT&T's documents – which it has failed to do so

far – there is no plausible claim of harm to that interest stemming from the short delay necessary to permit this Court to review the *Order*. CompTel's FOIA request has been pending since April 2005. CompTel could have filed suit seeking to compel disclosure shortly thereafter. *See* 5 U.S.C. § 552(a)(6)(C). CompTel instead waited over a year before initiating an action in district court, *see supra* n.2, and even at that point declined to seek expedited relief. CompTel's own delay in seeking to compel disclosure undermines any claim that a stay pending appeal would prejudice CompTel's interests.

Finally, and in all events, AT&T stands ready to brief and argue the merits of this case on any expedited schedule the Court chooses to adopt, so any delay resulting from a stay pending appeal is likely to be modest.

CONCLUSION

The Court should stay the *Order* pending judicial review.

Respectfully submitted,

Colin S. Stretch
Kelly P. Dunbar
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Wayne Watts
Paul K. Mancini
AT&T INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3448

Gary L. Phillips
Terri Hoskins
AT&T INC.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2055

Counsel for AT&T Inc.

September 25, 2008

Attachment A

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

In the Matter of	)
	)
SBC COMMUNICATIONS INC.	)
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On Request for Confidential Treatment	)
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MEMORANDUM OPINION AND ORDER

Adopted: September 9, 2008 **Released: September 12. 2008**

By the Commission:

1. The Commission has before it an application for review filed by SBC Communications, Inc. (SBC),[1] seeking review of a decision of the Enforcement Bureau (EB or Bureau), which rules on a Freedom of Information Act (FOIA) request by CompTel. SBC appeals that portion of EB's decision that denied in part SBC's request for confidential treatment of records responsive to CompTel's FOIA request. For the reasons set forth below, we deny SBC's application for review.[2]

I. BACKGROUND

2. On December 16, 2004, EB issued a consent decree[3] terminating its investigation into SBC's compliance with section 254 of the Communications Act, as amended, and Part 54 of the FCC's regulations.[4] CompTel, on April 4, 2005, filed a FOIA request seeking "[a]ll pleadings and correspondence contained in File No. EB-04-IH-0342 [*i.e.*, the investigation of SBC]."[5] In opposing

[1] SBC adopted the name AT&T, Inc. (AT&T) following its acquisition of the company by that name. *See http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21850* (company press release). Because, however, the pleadings and rulings before us refer to "SBC," we will generally use the name "SBC" in this memorandum opinion and order to avoid confusion. We will use the name "AT&T" only where the context makes it more appropriate.

[2] The procedural history of this case is somewhat complex. For reasons explained in greater detail below, CompTel's own application for review of EB's decision is not before us. We will discuss CompTel's FOIA request and application for review only to the extent necessary to clarify the matters under consideration.

[3] *SBC Communications Inc.*, 19 FCC Rcd 24014 (Enf. Bur. 2004). The consent decree addressed alleged irregularities in invoices submitted by SBC Connecticut to the Schools and Libraries Division of the Universal Service Administrative Company (USAC) for services provided to certain schools and other entities subsidized under the Universal Service Fund "E-Rate" program.

[4] *See* 47 U.S.C. § 254; 47 C.F.R. Part 54.

[5] E-FOIA request from Mary C. Albert, CompTel/ALTS (Apr. 4, 2005).

release of the requested documents, SBC, on May 27, 2005, for the first time requested confidential treatment of its submissions in that investigation.[6]

3. The Bureau granted in part and denied in part SBC's request for confidential treatment, and, accordingly, granted in part and denied in part CompTel's FOIA request.[7] The Bureau found that SBC had not complied with the procedures for seeking confidential treatment specified by section 0.459 of the Commission's rules.[8] EB held that SBC "failed to provide a statement of specific reasons for withholding its responses in their entirety," especially because it failed to meet the requirements of section 0.459 that it explain "how disclosure of the information could result in substantial competitive harm" and "whether any of the information for which it seeks protection is already available to the public."[9] The Bureau, however, examined SBC's submissions and determined that certain information in SBC's submissions should be treated as confidential, including "costs and pricing data, its billing and payment dates, and identifying information of SBC's staff, contractors, and the representatives of its contractors and customers." According to EB, such information, if released, was "likely to substantially harm SBC's competitive position," and was therefore exempt from disclosure under FOIA Exemption 4.[10] EB also determined that this information was not in the public domain.[11] In addition, the Bureau determined that the names of individuals identified in SBC's submission should be withheld from release to protect personal privacy under FOIA Exemptions 6 and 7(C).[12] EB ruled, however, that SBC itself, as opposed to the individuals mentioned in SBC's submissions, did not possess personal privacy interests protected by Exemptions 6 and 7(C).[13] Finally, the Bureau withheld from release pursuant to FOIA Exemption 5[14] drafts of EB pleadings and correspondence, and internal memoranda and e-mails discussing the SBC investigation,[15] which EB determined would disclose the Commission's deliberative process.

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[6] Letter from Jim Lamoureux, Senior Counsel, SBC Services, Inc. to Judy Lancaster, Enforcement Bureau (May 27, 2005). SBC's request for confidentiality specifically applied to financial documents that it submitted to EB in response to a letter of inquiry issued during the investigation. CompTel opposed SBC's request for confidentiality. Letter from Mary C. Albert, Vice President, Regulatory Policy to Judy Lancaster, Enforcement Bureau (Jun. 28, 2005).

[7] Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau to Jim Lamoureux, SBC Services, Inc. and Mary C. Albert, Vice President Regulatory Policy, CompTel/ALTS (Aug. 5, 2005) (*FOIA Decision*).

[8] 47 C.F.R. § 0.459.

[9] *FOIA Decision* at 4, *citing* 47 C.F.R. § 0.459(b)(5) and (7).

[10] *FOIA Decision* at 5. *See* 5 U.S.C. § 552(b)(4). Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

[11] *FOIA Decision* at 5. Specifically, EB found that 47 C.F.R. § 54.501(d)(3), which states that service providers' records of rates charged and discounts allowed shall be made available for public inspection, did not require the disclosure of all pricing data in SBC's submissions.

[12] *FOIA Decision* at 5-6, *citing* 5 U.S.C. §§ 552(b)(7)(C) (records complied for law enforcement purposes . . . [that] could reasonably be expected to "constitute an unwarranted invasion of personal privacy") and 552(b)(6) (. . . files the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy").

[13] *FOIA Decision* at 6.

[14] 5 U.S.C. § 552(b)(5) (inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency).

[15] *FOIA Decision* at 6.

4. Both CompTel and SBC filed applications for review of EB's decision.[16] While these pleadings were pending before the Commission, CompTel filed a civil action, pursuant to 5 U.S.C. § 552(a)(4)(B), in the United States District Court for the District of Columbia, seeking a judicial order compelling disclosure of the records withheld by EB.[17] AT&T[18] (as successor to SBC) intervened in CompTel's action as a defendant, and, on March 5, 2008, the court stayed the case. .[19] The court concluded that it could not address AT&T's "reverse FOIA" claim that certain records at issue should be withheld from disclosure because AT&T's claim could only be reviewed pursuant to the Administrative Procedure Act after final Commission action.[20] The court concluded further that the interests of judicial economy and efficiency would be served by staying CompTel's action until the Commission ruled on AT&T's administrative appeal. Accordingly, SBC's application for review is now before us.

5. SBC seeks review of the Bureau's denial in part of its request for confidential treatment. SBC challenges the Bureau's conclusion that FOIA Exemption 7(C) does not apply to corporations, contending that corporations are persons that have a privacy interest within the meaning of Exemption 7(C), and that this proposition is consistent with precedent.[21] Accordingly, SBC argues that its internal documents should be withheld pursuant to Exemption 7(C), because disclosure would embarrass SBC without serving any public policy interest.[22] CompTel responds that there is no precedent supporting the proposition that corporations have a personal privacy interest for purposes of Exemption 7(C).[23]

II. DISCUSSION

A. Procedural Matter

6. As an initial matter, we find that SBC's application for review does not conform with the Commission's Rules. In general, an application for review of an initial action on a request for inspection may be filed only by the person making the FOIA request (here CompTel).[24] There is an exception to this limitation where a request for inspection of records submitted to the Commission in confidence under section 0.457(d) or section 0.459 is granted or partially granted, in which case the person who submitted the records or the third party owner of the records may file an application for review.[25] However, despite

[16] Letter from Mary C. Albert to Samuel Feder (Sept. 6, 2005) (*CompTel Application for Review*); Letter from Jim Lamoureux, SBC Services, Inc., to Samuel Feder, [then] Acting General Counsel (Aug. 19, 2005) (*SBC Application for Review*).

[17] *CompTel v. FCC,* Civil Action 06-01718 (HHK) (D.D.C. filed Oct. 5, 2006). The FOIA permits such actions where the agency does not act on a FOIA request or appeal within the statutory time period. *See* 5 U.S.C. § 552(a)(6)(C)(i) (agency's failure to comply with statutory time period deemed to exhaust administrative remedies). Because the CompTel's judicial action is still pending, we will not address the merits of its application for review here.

[18] *See* note 1, *supra.*

[19] *CompTel v. FCC,* Civil Action 06-01718 (HHK) (D.D.C. memorandum opinion and order Mar. 5, 2008).

[20] *See generally Chrysler Corp. v. Brown,* 441 U.S. 281 (1979) (discussing reverse FOIA requests).

[21] SBC Application for Review at 2-8.

[22] *Id.* at 4-5.

[23] Letter from Mary C. Albert, Vice President, Regulatory Policy to Samuel Feder, Esq.,, [then] Acting General Counsel (Sept. 1, 2005) (*CompTel Opposition)* at 3-6.

[24] 47 C.F.R. § 0.461(j).

[25] 47 C.F.R. § 0.461(i)(1) and (2), *citing* 47 C.F.R. §§ 0.457(d) and 0.459.

notice from EB of its right to do so,[26] SBC did not seek confidential treatment of its submissions in accordance with section 0.459(a) by filing a timely request for confidentiality when it submitted the material, and thus does not qualify to file an application for review pursuant to the terms of section 0.461(i).[27] This failure to comply with our rules would alone justify the denial of SBC's request for confidential treatment. Although we admonish SBC that it should have complied with section 0.459, we are mindful of the provisions of FOIA Exemption 4 and the Trade Secrets Act[28] to prevent disclosure of confidential information and to consider the views of the submitter when making disclosure determinations. Therefore, we have considered the information and arguments subsequently submitted by SBC on our own motion.

B. Exemption 7(C)

7. We disagree with SBC's contention that we should withhold all of the documents that it submitted in response to EB's letter of inquiry under Exemption 7(C).[29] SBC argues that disclosure of these records, all indisputably "compiled for law enforcement purposes," could reasonably be expected to "constitute an unwarranted invasion of personal privacy."[30] In this regard, SBC characterizes itself as a "private corporate citizen" with personal privacy rights that should be protected from disclosure that would "embarrass" it.[31] However, SBC's position that a corporation has "personal privacy" interests within the meaning of Exemption 7(C) is at odds with established Commission and judicial precedent. In *Chadmoore Communications, Inc.*,[32] the Commission held that information regarding an individual acting in the capacity of a commercial licensee, that is, in a business capacity, did not implicate a privacy interest for purposes of Exemption 7(C). The clear implication of *Chadmoore* is that information regarding a corporation would not be exempt either.[33] Our holding is consistent with judicial decisions in

[26] EB's letter of inquiry specifically advised SBC: "If the Company [SBC] requests that any information or Documents, as defined herein, responsive to this letter be treated in a confidential manner, it shall submit, along with responsive information and Documents, a statement in accordance with section 0.459 of the Commission's rules." Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearing Division, EB to Michelle A. Thomas and Christopher Heimann [SBC] (Aug. 24, 2004) at 1-2.

[27] SBC's response to CompTel's FOIA request states: "All of the records responsive to the CompTel/ALTS [FOIA] request were issued and obtained by the Commission as part of an Enforcement Bureau investigation, and thus, pursuant to 0.457, are not routinely available for public inspection." Letter from Jim Lamoureux to Judy Lancaster (May 27, 2005). SBC thus implies that it was not required to comply with section 0.459. We disagree. Because the material submitted by SBC was not specifically listed as confidential commercial and financial information under section 0.457(d)(1), section 0.457(d)(2) required SBC to submit a request for confidentiality under section 0.459. Section 0.461(i) does not permit a party submitting confidential documents to the Commission to wait to claim confidentiality, as SBC did, until a FOIA request is filed.

[28] 18 U.S.C. § 1905.

[29] FOIA Exemption 7(C) applies to "records or information compiled for law enforcement purposes . . . to the extent that production of such law enforcement records or information . . . could reasonably expected to constitute an unwarranted invasion of personal privacy."

[30] *See* 5 U.S.C. § 552(b)(7)(C).

[31] *SBC Application for Review* at 4.

[32] 13 FCC Rcd 23943, 23946-47 ¶ 7 (1998).

[33] *Chadmoore* references a line of cases holding that corporations do not have a "personal privacy" interest for purposes of Exemption 6. *See* 13 FCC Rcd at 23946-47 ¶ 7 and *Electronic Privacy Information Center v. Dep't of Homeland Security,* 384 F.Supp.2d 100, 118 n.29 (D.D.C. 2005); *Hill v. Dep't of Agriculture,* 77 F.Supp.2d 6, 7 (D.D.C. 1999); *Ivanhoe Citrus Ass'n v. Handley,* 612 F.Supp. 1560, 1567 (D.D.C. 1985). "While it has been established that Exemption 7(C) and Exemption 6 are not completely congruent, the difference lies in the standard of review and not the relevant privacy interest covered by the exemption." *Cohen v. EPA,* 575 F.Supp. 425, 429 n. 6 (D.D.C. 1983), *citing FBI v. Abramson,* 456 U.S. 615, 630 n. 13 (1982) (Exemption 6 protects against the disclosure (continued....)

Washington Post Co. v. U.S. Dep't of Justice[34] and *Cohen v. EPA.*[35] In *Washington Post*, the United States Court of Appeals for the District of Columbia Circuit stated that the disclosures with which Exemption 7(C) is concerned are those of "an intimate personal nature" such as "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation."[36] In *Cohen*, the United States District Court for the District of Columbia cited the same examples.[37] These cases hold that Exemption 7(C) does not cover information relating to business judgments and relationships, even if disclosure might tarnish someone's professional reputation.[38] Thus, in *Washington Post*, the D.C. Circuit held that Exemption 7(C) did not cover the report of an internal corporate investigation that mentioned individual employees by name but did not identify them as being personally the target of the investigation.[39] In *Cohen,* the district court held that Exemption 7(C) did not cover the names of individuals, such as corporate officials, mentioned in EPA hazardous waste notices, since they were identified only in their "public role" of being the users of hazardous waste disposal sites and would no more be subject to harassment than if the name of the corporation were disclosed.[40] Like *Chadmoore,* these cases imply that Exemption 7(C) does not cover a corporation's "privacy interest," since a corporation's interests are of necessity business interests. SBC points to no Exemption 7(C) cases that are to the contrary.

8. SBC urges us to depart from this precedent on several grounds, none of which are persuasive. Unlike SBC, we do not believe that protecting a corporation from "embarrassment" falls within the purposes of Exemption 7(C), as interpreted by the courts.[41] Judicial discussion of the purposes of Exemption 7(C) focus on the kinds of tangible personal impact that disclosure of information of an intimate personal nature might have on the targets of investigations, witnesses, and participating law enforcement officials, such as damage to their personal reputation, embarrassment, and the possibility of

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of information that would constitute a "clearly unwarranted" invasion of personal privacy, whereas Exemption 7 (C) does not require the harm to privacy to be "clearly unwarranted"); *see also U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989) (noting the same distinction and that Exemption 6 uses the word "would" while Exemption 7(C) uses "could reasonably").

[34] 863 F.2d 96, 100-01 (D.C. Cir. 1988).

[35] 575 F.Supp. 425, 429-30 (D.D.C. 1983).

[36] 863 F.2d at 100.

[37] 575 F. Supp. at 429.

[38] 863 F.2d at 100 ("Information relating to business judgments and relationships does not qualify for exemption [7(C)]"); 575 F.2d at 429 ("The privacy exemption [in Exemption 7(C)] does not apply to information regarding professional or business activities").

[39] The D.C. Circuit, in *McCutcheon v. U.S. Dep't of Health and Human Services*, 30 F.3d 183, 187 (D.C. Cir. 1994), clarified that, although the exemption does not generally cover business judgments and relationships, information that accused individual employees of having a committed a crime in connection with their employment would implicate "the privacy interest of personal honor" and that "the protection accorded reputation under Exemption 7(C) would generally shield material" that "would show that an individual was the target of a law enforcement investigation." As noted, however, the internal corporate report in *Washington Post* did not identify any individual employees as being the targets of investigation and no such information is at issue in the present case.

[40] To the extent that the notices identified individuals as being potentially responsible for hazardous waste violations, the court held that the public interest outweighed the individuals' privacy interests.

[41] We have previously held that public embarrassment to a corporation did not warrant withholding material under Exemption 4. *Liberty Cable Co., Inc.,* 11 FCC Rcd 2475, 2476 ¶ 7 (1996), *aff'd sub nom. Bartholdi Cable Co., Inc. v. FCC,* 114 F.3d 274 (D.C. Cir. 1997), *citing CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) *and General Electric Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

harassment.[42] We read the courts' discussion in these cases to refer to the literal embarrassment and danger that an individual might suffer from disclosure of information of a personal nature and not to the more abstract impact that disclosure might have on a legal entity like a corporation.

9. SBC also argues that in *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*,[43] the United States Supreme Court did not limit the applicability of Exemption 7(C) to individuals.[44] This argument is inapposite because *Reporters Committee* involved a rap sheet unique to a particular individual and the Court had no reason to address the applicability of its holding to corporations. Nonetheless, to the extent that *Reporters Committee* is at all relevant, it is fully consistent with EB's determination that Exemption 7(C) applies only to individuals' privacy interests. In analyzing the intent of Congress with respect to Exemption 7(C), *Reporters Committee* relies on both the Privacy Act[45] and FOIA Exemption 6, both of which apply only to individuals,[46] suggesting that the privacy interest involved in all three provisions is similar and applicable only to individuals.

10. SBC's remaining arguments amount to the assertion that because a corporation may be treated as a "person"[47] and have "privacy interests" for some purposes, it has personal privacy interests for purposes of Exemption 7(C). Such reasoning cuts too broadly. The privacy interests relevant to Exemption 7(C) are those discussed in paragraphs 8 and 9, *supra*. The interests underlying other forms of "privacy" that might be relevant in other contexts are not controlling for purposes of Exemption 7(C).[48]

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[42] *See, e.g., Washington Post*, 863 F.2d at 100-01; *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 894 (D.C. Cir. 1995) (". . . individuals have an obvious privacy interest . . . in keeping secret the fact that they were subjects of a law enforcement investigation," as do witnesses and informants); *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333 (E.D. Va. 1996) ("Law enforcement officers, interviewees, suspects, witnesses, and other individuals named in investigatory files all have substantial privacy interests" because revelation could result in "embarrassment or harassment"). SBC notes that in *Alexander & Alexander Services, Inc. v. SEC*, 1993 WL 439799 (D.D.C. 1993) at *10, the district court held that Exemption 7(C) applies when "a private citizen seeks information regarding another private citizen *or corporation*. . . . " SBC Application for Review at 8. [Emphasis added.] However, that case, like *Washington Post*, concerned the personal privacy of individuals named in corporate documents, not the privacy of the corporation itself.

[43] 489 U.S. 749 (1989).

[44] *SBC Application for Review* at 4.

[45] 5 U.S.C. § 552a.

[46] *See Reporters Committee for Freedom of the Press*, 489 U.S. at 766-68. SBC admits that Exemption 6 applies only to individuals. *SBC Application for Review* at 6. The Privacy Act provides on its face that it applies only to individuals. *See* 5 U.S.C. § 552a (titled "Records maintained on individuals"). *Reporters Committee* effectively rebuts SBC's argument that EB erred in equating the protection afforded by Exemptions 6 and 7(C). *SBC Application for Review* at 6. *See also* note 36, *supra*.

[47] A corporation is defined as a "person" under the Administrative Procedure Act (APA), of which the FOIA is a part. *See* 5 U.S.C. § 551(2). Thus, a corporation falls within the scope of FOIA Exemption 4, which speaks of commercial and financial records obtained from a person. *See Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12729 n.24 (2004), *citing Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). The APA does not, however, define "personal" or "personal privacy." It is therefore irrelevant, for example, whether FOIA Exemption 7(B), which applies to records or information that "would deprive a person of a right to a fair trial or an impartial adjudication," applies to corporations, as SBC contends. SBC Application for Review at 6. A corporation's right to a fair trial is not based on any personal privacy interest.

[48] *See Reporters Committee*, 489 U.S. at 762 n. 13 ("The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution."), *citing Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (Constitution prohibits State from penalizing publication of name of deceased rape victim obtained from public records).

Thus, for example, it is not relevant that a corporation may have a constitutionally protected privacy interest against unreasonable search and seizure of its property under the Fourth Amendment, as found in *U.S. v. Hubbard*,[49] cited by SBC. SBC has not demonstrated that the holding in *Hubbard* compels or even supports a finding that a corporation has any personal privacy interest that justifies withholding of documents under the FOIA.[50] Likewise, the privacy interests found in *Tavoulareas v. Washington Post Co.*,[51] and cited by SBC, involved the "constitutionally protected privacy interest in avoiding the public disclosure of sensitive commercial information [obtained in civil discovery and not used at a trial between private parties]."[52] It had nothing to do with FOIA Exemption 7.[53] The constitutional privacy analysis applied by the panel in *Tavoulareas* was, in any case, vacated on rehearing by the court *en banc*.[54]

11. For all of the reasons discussed above, we find that Exemption 7(C) has no applicability to corporations such as SBC. Accordingly, we deny SBC's application for review.

III. ORDERING CLAUSE

12. ACCORDINGLY, IT IS ORDERED that SBC Communications Inc.'s application for review IS DENIED. If SBC does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the redacted records will be produced to CompTel, as specified in the Enforcement Bureau's decision. *See* 47 C.F.R. § 0.461(i)(4).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[49] 650 F.2d 293, 306 (D.C. Cir. 1980), *cited in SBC Application for Review* at 6.

[50] In *Hubbard,* the government seized documents from non-public areas of the premises of the Church of Scientology. Subsequently, the Church proffered the documents in support of a motion asserting that the seizure was unconstitutional. The appellate court reversed the trial judge's order unsealing the documents. It held that the "single most important element" in its decision to protect the documents was that they had been put in the record solely to support a motion to demonstrate the unlawfulness of the seizure and that it would undermine the Fourth Amendment for the documents to be disclosed under those circumstances. The fact that a corporation may have an interest in protecting itself from the unlawful seizure of its property does not imply that it has the distinctly different "personal privacy" interest relevant to Exemption 7(C).

[51] 724 F.2d 1010, 1018 (D.C. Cir. 1984), *reh. granted en banc and vacated*, 737 F.2d 1170 (D.C. Cir. 1984), *cited in SBC Application for Review* at 5. The court *en banc* directed the District Court to apply a discretionary "good cause" analysis under Rule 26(c) of the Federal Rules of Civil Procedure, which relates to protective orders.

[52] 724 F.2d at 1023.

[53] The privacy interest protected in *Tavoulareas* seems somewhat similar to the interest protected by FOIA Exemption 4, which applies to corporations as well as individuals. 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential").

[54] *See supra* note 51.

Attachment B

DECLARATION OF LESLIE A. BOWMAN

1. My name is Leslie A. Bowman. My business address is 6 Devine St., North Haven, CT, 06473. I hold the title of Area Sales Director – Government and Education in the Southern New England Telephone Company ("SNET"), a subsidiary of AT&T Inc. ("AT&T"). In this position, I am responsible for managing a team of sales professionals who meet the needs of government and education accounts throughout Connecticut.

2. The purpose of my declaration is two-fold. First, I describe the documents provided by AT&T to the Federal Communications Commission ("FCC") in connection with the FCC's investigation of certain invoices that AT&T submitted to the universal service fund administrator related to projects that AT&T performed for the New London, Connecticut school district ("New London Public Schools") (FCC File No. EB-04-IH-0342). Second, I describe the irreparable harm that would result from disclosure of those documents, both in terms of harassment, embarrassment, and stigmatization, and with respect to AT&T's ability to compete in the marketplace.

Background

3. In 2004, AT&T (then known as SBC Communications Inc.) informed the FCC that AT&T had discovered concerns regarding certain invoices related to the FCC's "Education Rate," or "E-Rate," universal service program. AT&T explained that SNET had submitted arguably improper invoices to the universal service fund administrator relating to services performed for New London Public Schools.

4. The FCC subsequently issued a Letter of Inquiry ordering AT&T to produce a wide range of documents as a part of its investigation into possible violations of FCC rules, 47 C.F.R. §§ 54.500-54.521 (2003), and FCC orders pertaining to universal service. The Letter of Inquiry

sought detailed information relating to various projects in Connecticut. For each such project, the FCC asked for, among other things, dates on which AT&T invoiced the universal service fund administrator, dates on which AT&T refunded the universal service fund administrator, the names of all AT&T personnel involved in deciding how to bill under the E-Rate program, and the names of all AT&T personnel aware of decisions regarding billing under the E-Rate program. The Letter of Inquiry also instructed AT&T to provide its Code of Business Conduct and to state which sections of the Code, if any, were violated by the billing in question.

5. AT&T responded to the Letter of Inquiry with a declaration, answers to interrogatories, and documents. The documents include, among other things, internal AT&T email communications; AT&T job descriptions; completed universal service invoice forms; funding committee reports provided by the universal service fund administrator; AT&T billing invoices (many of which include handwritten notes by AT&T personnel) containing product, project, and pricing information; confidential AT&T engagement forms; quotation forms; vendor information sheets; and AT&T's Code of Business Conduct.

6. More specifically, the document set, which includes more than 150 documents comprising more than 250 pages, includes, among other things:

- A one-page cover letter from AT&T to the FCC describing its response to the Letter of Inquiry.
- A one-page declaration of an AT&T employee describing generally AT&T's discovery of the arguably improper billing.
- A 15-page written response to interrogatories by the FCC. This document provides detailed information regarding when AT&T invoiced the universal service fund administrator for each New London Public School project at issue, the dates on which the universal service fund administrator paid the invoices, the dates on which AT&T refunded the universal service fund administrator, amounts that AT&T billed for each project in various years of the E-Rate program, and the names and job titles of employees who decided whether and when AT&T could bill the universal service fund administrator

for the projects at issue. This response also contains written descriptions of how AT&T employees arrived at their arguably incorrect understanding of FCC rules, and it identifies provisions of AT&T's Code of Business Conduct that the named employees arguably violated.

- Nine pages of job descriptions of AT&T personnel involved in the arguably improper billing of the universal service fund administrator for work performed for New London Public Schools.

- Eighteen pages of completed universal service fund administrator invoice forms completed by AT&T. These include, among other things, AT&T's service provider identification number, the amounts that AT&T invoiced to the universal service fund administrator, contact information for AT&T, the dates on which AT&T submitted the service provider invoices, and the dates on which AT&T billed its customers.

- Three pages of universal service funding committee reports containing, among other information, names of customers receiving the services provided by AT&T, the dates on which contracts were awarded, and the dates of funding decisions by the funding committee.

- More than 75 pages of internal AT&T emails (including documents attached to emails). These describe, among other things, cost and pricing information in connection with services provided to New London Public Schools, details of AT&T's discussions with representatives of New London Public Schools, descriptions of AT&T's billing and invoice procedures, work sheets detailing pricing information used for billing the universal service fund administrator, an original bill of materials (including list price and unit price) for equipment installed in connection with projects for New London Public Schools, discussions of proper billing under the E-Rate program, discussions of invoice procedures with respect to the universal service fund administrator, confidential engagement forms for New London Public Schools, E-Rate billing information for a particular year, and charts summarizing services and universal service fund decisions for New London Public Schools.

- More than 30 pages of AT&T billing invoices and maintenance orders describing charges for work performed by AT&T for New London Public School customers. These invoices include, among other things, descriptions of the services provided and work performed, pricing information, AT&T's customers' names, dates on which the billing occurred, and handwritten notations by AT&T employees, including payment calculations.

- Twelve pages of commitment adjustment letters (some with handwritten notations by AT&T employees) from the universal service fund administrator to AT&T and New London Public Schools, including funding commitment reports in connection with applications for universal service funding.

- More than 10 pages of billing invoices provided by vendors to AT&T, including price and billing information, as well as descriptions of the work performed.

- Eighteen pages of AT&T price quotations to New London Public Schools, which include unit price and extended price information, as well as descriptions of the services to be performed.

- Handwritten notes describing price and cost information for materials and labor in connection with New London Public School projects.

- Accounts payable authorization forms relating to AT&T's refund to the universal service fund administrator.

- A five-page description of hardware sold to New London Public Schools provided by an AT&T vendor.

- AT&T's 23-page Code of Business Conduct.

Irreparable Harm Resulting from Disclosure

7. The documents that AT&T provided in response to the FCC's Letter of Inquiry include information that, if released, could be used to attempt to embarrass, harass, and stigmatize AT&T as a corporation, as well as individual AT&T employees.

8. These documents are confidential internal documents of AT&T and are responsive to the FCC's request for information relating to possible violations of FCC rules. The documents contain the names, and other identifying information, of individuals involved in the arguable violations of FCC rules. Such information could be used to attempt to embarrass, harass, or stigmatize AT&T as a corporation or those employees as individuals by making public that those individuals were identified as involved in arguable violations of FCC rules.

9. Aside from the names and other identifying information of individual AT&T employees, the requested documents contain facts and descriptions that reveal the what, when, where, why, and how of AT&T's alleged violations of FCC rules. These documents, taken

together, show the decisionmaking processes that led to the alleged violations of the FCC rules, the period of time over which the arguable billing errors occurred, and AT&T's internal responses to the arguable misconduct. With those details of supposed corporate wrongdoing in hand, CompTel and others could piece together basic time lines and theories of how and why the arguable violations of FCC rules came about. Such information could then be used by competitors or others to attempt to embarrass, harass, and stigmatize AT&T publicly by, for example, citing such information in press releases, advertisements, or news reports. Such information also could be used by competitors in regulatory proceedings, in an attempt to prejudice decisionmakers against AT&T's interests. Disclosure would, as a result, harm AT&T's reputation and goodwill.

10. The requested documents also contain internal information about AT&T's operational and billing processes and practices, AT&T's standards of corporate conduct, and other confidential information. Because these documents were collected pursuant to the FCC's investigation – and are compiled in an investigatory file – their disclosure in this context would enable competitors and others, among other things, to attempt to disparage the reliability of AT&T's operational and billing processes and practices, criticize publicly the effectiveness of AT&T's standards of corporate conduct, and otherwise target AT&T by making public currently private commercial facts pertaining to alleged violations of FCC rules, thus harming AT&T's reputation and goodwill.

11. The redactions made by the FCC, pursuant to FOIA Exemption 4, do not materially diminish the likelihood that the disclosure of the documents would result in the embarrassment, harassment, and stigmatization of AT&T. The FCC redacted from the requested documents (i) cost and pricing data in connection with services and hardware used in connection with the

New London Public School projects; (ii) amounts for which AT&T invoiced the universal service fund administrator; (iii) dates on which AT&T invoiced the universal service fund administrator; the universal service fund administrator paid the invoice, and AT&T refunded the payment; and (iv) names and identifying information of AT&T's staff, contractors, and representatives of its contractors and customers.

12. For the reasons stated above, the redacted documents still reveal important confidential facts, including important details about how AT&T employees arrived at an arguably incorrect understanding of FCC rules, the level of corporate decisionmaking involved in the billing decisions, AT&T's internal response to those arguable billing violations, as well as AT&T's own assessment of whether and the extent to which its employees violated the company's code of conduct.

13. This concludes my declaration.

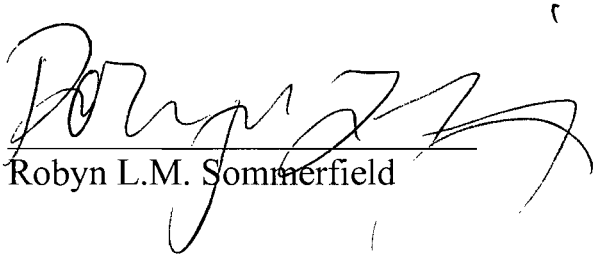
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

September 20, 2008

Leslie A. Bowman

CERTIFICATE OF SERVICE

I hereby certify that, on the 25th day of September 2008, I caused copies of the foregoing Petition for Review and Corporate Disclosure Statement to be served upon each of the following on the attached service list by hand delivery.



Robyn L.M. Sommerfield

SERVICE LIST

FEDERAL COMMUNICATIONS COMMISSION

Matthew Berry
General Counsel
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

UNITED STATES OF AMERICA

Catherine G. O'Sullivan
Nancy C. Garrison
United States Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530-0001

COMPTEL

Mary C. Albert
CompTel
900 17 Street, N.W., Suite 400
Washington, D.C. 20006
(202) 926-6650