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 11 **IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 ELECTRONIC FRONTIER,
 13 FOUNDATION
 Plaintiff,
 14
 v.
 15 DEPARTMENT OF JUSTICE,
 16 FEDERAL BUREAU OF
 INVESTIGATION, AND DRUG
 17 ENFORCEMENT ADMINISTRATION,
 18 Defendants.

Civil Action No. C 10cv04892 (SI)

THIRD DECLARATION OF
 KATHERINE L. MYRICK
 DRUG ENFORCEMENT
 ADMINISTRATION

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 20 1. I am currently the Chief of the Freedom of Information (FOI)/Privacy Act Unit, FOI/Records
 21 Management Section (SARF), Drug Enforcement Administration (DEA), United States
 22 Department of Justice (DOJ), located at DEA Headquarters in Arlington, Virginia. I have served
 23 in this capacity since 1998 and oversee the processing of requests to DEA under the Freedom of
 24 Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act (PA) of 1974, 5 U.S.C. § 552a.
 25 SARF is the central DEA office responsible for responding to, searching for, and processing and
 26 releasing DEA information requested under the FOIA and PA.

1 2. Due to my experience in responding to requests for DEA records since 1998, and the nature
2 of my official duties, I am familiar with the policies and practices of DEA and DOJ related to
3 searching for, processing, and the release of DEA information responsive to FOIA and PA
4 requests and, in particular, I am familiar with the processing of Plaintiff's request to DEA that is
5 the basis of this suit.

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7 3. In preparing this declaration, I have read and am familiar with the Complaint in the above
8 titled action and its pleadings, including the Plaintiff's Cross Motion for Summary Judgment and
9 Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Cross Motion and
10 Opposition"). The statements I make hereinafter are made on the basis of my personal
11 knowledge, review of DEA records and the six (6) interim releases made by DEA in this case,
12 and information acquired by me in the performance of my official duties as Chief of SARF.

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14 4. I have provided two prior declarations for the instant FOIA litigation. The first of the
15 declarations ("First Myrick Decl."), dated January 24, 2011, provided the Court with information
16 regarding DEA's processing of Plaintiff's six-item request dated September 28, 2010. The
17 second declaration ("Second Myrick Decl."), dated February 29, 2012, set forth DEA's
18 processing methodology and reasons for withholding certain documents. The purpose of this
19 declaration is to provide the Court with further information regarding those records specifically
20 addressed in the Plaintiff's Cross Motion and Opposition.

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22 **MATERIALS OUTSIDE THE SCOPE OF PLAINTIFF'S REQUEST**

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24 5. As stated in my second declaration, potentially responsive records were grouped by like
25 topical and/or functional categories and reviewed page-by-page for responsiveness to the
26 Plaintiff's request. See Second Myrick Decl. ¶ 8(a)-(b). The rolling page-by-page review,
27 consultation, and processing efforts identified large numbers of non-responsive and duplicate

1 pages as a result of the broad six-item request and overlapping search efforts. *Id.* With respect
2 to each responsive page, DEA documented the applicable exemptions invoked for information
3 that was withheld in full (WIF) or released in part (RIP) as detailed in its *Vaughn* Index. *Id.* ¶
4 8(c).

5
6 6. Although the *Vaughn* Index does not list and describe each non-responsive document, those
7 non-responsive pages referenced in the Plaintiff's Cross Motion can be discerned by identifying
8 pages not listed or skipped over in the *Vaughn* Index, under Category 5C, and comparing it to the
9 total number of non-responsive pages provided in the footnotes. *See id.* ¶ 20; *Vaughn* Index at
10 12-13. Specifically, Category 5C contains the following non-responsive pages: 26-27, 44, 48,
11 55, 58, 61-62, 71-77, 81, 84-85, 90-95, 126, 148-49, 191, and 203.

12
13 7. These non-responsive pages consist of presentation slides. Each slide is self-contained,
14 which allowed DEA to review and scope the content of the slide against Plaintiff's six-item
15 FOIA request. Slides found to be non-responsive fall into two categories: (1) slides containing
16 internal legislative or policy discussions and proposed strategies regarding electronic surveillance
17 that do not pertain to specific or technical problems that hamper the DEA's current ability to
18 conduct surveillance on communications systems or networks; and (2) slides containing names,
19 titles, and phone numbers of points of contacts. These slides are outside the scope of the
20 Plaintiff's request because they do not discuss, concern, or reflect specific or technical problems
21 that hamper the DEA's current ability to conduct surveillance on communications systems or
22 networks. Further, the slides were not responsive to any of the other five items listed in the
23 Plaintiff's request.

WITHHELD MATERIAL-EXEMPTION 4

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3 8. DEA withheld portions of material within Categories 5C and 6¹ under Exemption 4 as
4 “commercial or financial information obtained from a person [that is] privileged or confidential.”
5 5 U.S.C. § 552 (b)(4). Materials withheld were voluntarily provided to DEA by five (5) private
6 companies and consisted of proprietary information about their internal operations, technical and
7 product capabilities, and compliance plans. *See* Second Myrick Decl. ¶ 21(b)(2), (c)(2). Without
8 the cooperation of the companies, DEA would have been unable to legally compel the companies
9 to provide this type of proprietary information for the purpose of solving particular intercept
10 issues. All five companies objected to the disclosure by DEA of its commercial and financial
11 information voluntarily provided to DEA and confirmed that this information shared with DEA
12 is not information customarily released to the public. *Id.*

13
14 9. In addition, the companies articulated the competitive harm that would result from the
15 release of its proprietary information shared with DEA and made clear that release would
16 adversely impact DEA’s ability to obtain any such information in the future. This is particularly
17 problematic in light of DEA’s reliance on a cooperative relationship with private companies to
18 solve its intercept problems.

19
20 10. The objections raised by the companies which operate in the communications market,
21 including the commercial mobile radio services (CMRS) and satellite markets, show that
22 disclosure of their proprietary information would damage their competitive positions because of.

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26 ¹ Upon further review, DEA found an additional page within Category 6 that contains information
27 previously withheld under Exemption 4. This accounting mistake brings the total number of pages of Exemption 4
28 material, under Category 6, to 11 pages instead of 10 pages. Information contained in these pages was, and
continues to be, also withheld under Exemptions 5, 6, 7C, 7D, and 7E.

1 the competitiveness of these markets.² As one company explained, because there are a small
2 number of competitors in these markets, the disclosure of proprietary information about the
3 company could readily enable a competitor to differentiate its product, services, technology, or
4 market position, and seek a higher percentage of the relevant market. This is especially so with
5 respect to the sensitive operational, technical, or compliance information that these companies
6 have provided to DEA. In light of the close competition and the pressure to match technical
7 innovations in markets where technology often differentiates between competitors, the release of
8 proprietary information provided to DEA by these private companies would harm DEA's ability
9 to obtain any such information in the future. Accordingly, DEA properly withheld, under
10 Exemption 4, privileged and confidential commercial information voluntarily provided by the
11 five private companies.

12
13 **WITHHELD MATERIAL-EXEMPTION 5**

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15 11. DEA has invoked Exemption 5 with respect to a two-page bulletin addressing a particular
16 intercept issue. *See* Second Myrick Decl. ¶ 22; *Vaughn* Index at 15-16. Further consultation
17 with DEA's program office revealed that the document was drafted and submitted by a
18 subordinate to his/her supervisor for review. The draft bulletin reflected the thoughts and
19 opinions of the subordinate, which were ultimately not adopted by DEA. Thus, information
20 contained in the bulletin did not represent the final agency position of DEA. Accordingly, DEA
21 properly withheld the bulletin under Exemption 5 as the document was an internal agency
22 document containing deliberative information.

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25 ² *See Report and Analysis of Competitive Market Conditions with Respect to Domestic and International*
26 *Satellite Communications Services*, IB Docket Nos. 09-16, 10-99, Third Report, 26 FCC Rcd 17284 (2011)
27 (describing the overall competitive landscape of the satellite industry); *see also Implementation of Section 6002(b) of*
28 *the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with*
Respect to Commercial Mobile Services, FCC 11-103, Fifteenth Report, 26 FCC Rcd 9664 (2011) (describing the
competitive market conditions with respect to Commercial Mobile Radio Services).

WITHHELD MATERIAL-EXEMPTION 7E

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3 12. DEA has invoked Exemption 7E with respect to law enforcement surveillance and intercept
4 techniques and vulnerabilities, the disclosure of which could reasonably be expected to risk
5 circumvention of the law. Contrary to Plaintiff's contentions, DEA has segregated and released
6 information pertaining to techniques and technologies that are widely known. As apparent from
7 the unredacted text within the documents cited in Plaintiff's Cross Motion and Opposition, DEA
8 produced the names of a wide variety of communications providers and the methods employed
9 by those providers in today's market. *See* Plaintiff's Cross Motion and Opposition at 34.
10 Information withheld by DEA, under Exemption 7E, consists of detailed information regarding
11 the problems, obstacles, or limitations that hamper DEA's current ability to conduct surveillance
12 on communications systems or networks, as well as DEA's countermeasures to these limitations
13 and obstacles. This information is not publicly known. Further, the disclosure of this
14 information will hinder DEA's current investigative efforts and allow criminal elements to
15 circumvent DEA's law enforcement functions. Accordingly, DEA properly withheld information
16 pertaining to its law enforcement techniques and vulnerabilities under Exemption 7E.

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I declare under the penalty of perjury that the foregoing is true and correct.

4/25/12

Katherine L. Myrick

DATE

KATHERINE L. MYRICK
Chief, FOI/Privacy Act Unit
FOI/Records Management Section
Drug Enforcement Administration
Washington, D.C. 20537