

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

IN RE ELECTRONIC PRIVACY)	
INFORMATION CENTER, <u>ET AL.</u> ,)	No. 12-1307
)	
Petitioner.)	
)	

**DECLARATION OF JOHN P. SAMMON IN SUPPORT OF
RESPONDENTS' OPPOSITION TO PETITION FOR MANDAMUS**

I, John P. Sammon, an employee of the U.S. Department of Homeland Security (DHS), Transportation Security Administration (TSA), 601 South 12th Street, Arlington, VA 20598-6002, declare as follows:

1. I am over the age of eighteen (18) and provide this declaration based on my personal knowledge and information gained in my official capacity.
2. I am the Assistant Administrator for the Office of Security Policy and Industry Engagement (OSPIE) within TSA. I have worked for TSA as the Assistant Administrator of OSPIE and its predecessor entity within TSA – the Office of Transportation Sector Network Management (TSNM) – since July 9, 2006. Prior to joining TSA, I was the principal partner in a software venture, e-Carload. I bring twenty-five years of transportation experience to my current position, including management of customer networks for railroads, motor

carriers, ocean carriers, petrochemical manufacturers, and ports and other public agencies.

3. One of my responsibilities as Assistant Administrator for OSPIE (and before that TSNM) is to assist in the oversight and coordination of TSA's rulemaking efforts. In particular, OPSIE has responsibility within TSA for the analysis of proposed regulatory actions, including items such as a notice of proposed rulemaking (NPRM), among other policy and operational responsibilities. TSA's Regulatory and Economic Analysis Division (REA) is part of OSPIE, and falls under my authority as Assistant Administrator.

4. As a result of this responsibility, I am well-acquainted with the requirements for notice-and-comment rulemaking, including the issuance of an NPRM, and the various regulatory efforts that TSA currently has in progress.

5. As Assistant Administrator for OSPIE, I am also responsible for leading a unified effort to protect and secure, through public-private networks, the Nation's intermodal transportation systems, including aviation, rail, transit, maritime, cargo, highway and energy pipelines. OSPIE accomplishes this by developing risk-reducing security policies, plans, and procedures.

6. I am familiar with this Court's opinion in *EPIC v DHS*, No. 10-1157, issued on July 15, 2011, which directs TSA "to conduct notice-and-comment

rulemaking” regarding TSA’s use of Advanced Imaging Technology (AIT) (Opinion).

7. There are a number of significant and substantial requirements that an agency must observe and satisfy before issuing an NPRM, including one in satisfaction of this Court’s mandate (hereinafter “the AIT Rulemaking”). The obstacles to swift completion of the AIT Rulemaking are set forth in a declaration by James Clarkson, who currently supervises the REA Division within OSPIE, that was signed on November 9, 2011, and submitted to this Court on November 10, 2011, in support of the Respondents’ Opposition to EPIC’s Motion to Enforce the Mandate in *EPIC v. DHS*, No. 10-1157 (Clarkson Declaration). Notice-and-comment rulemaking is a deliberative, complex, and sophisticated process, made more so by the most recent Executive Order discussed in the Clarkson Declaration.

8. Preparation of the NPRM for the AIT Rulemaking is further complicated by the breadth of the issues that must be addressed in the preamble. As this Court’s Opinion noted, the primary concern regarding TSA’s use of AIT was privacy, but the efficacy and safety of AIT were also identified as matters that would be appropriate for requiring notice-and-comment rulemaking in this instance. Furthermore, as explained in greater detail below, the need to consider

both costs already incurred and estimated future costs is atypical of the economic analyses that must accompany an NPRM.

9. Although TSA conducted analyses and made determinations regarding the adequacy of privacy protections attendant to AIT, as well as its efficacy and safety as a screening technology, in order to inform its decision to acquire and deploy AIT, the statutory and regulatory requirements described in the Clarkson Declaration mandate a particularized analysis and presentation of these issues for purposes of issuing an NPRM.

10. In addition to the statutory and regulatory requirements for typical rulemakings, the fact that AIT is a maturing technology is a complicating factor for the rulemaking overall. For example, since this Court issued its Opinion, TSA has approved the use of Automated Target Recognition (ATR) upgrades to one of the two types of AIT approved for purchase and deployment; that alternative form of privacy protection is now present on approximately two-thirds of the AITs currently in use. TSA is also constantly testing its screening procedures – including the use of AIT and ATR – in both the laboratory and in operational settings. Additional data have also been generated since the rulemaking process began regarding the safety of backscatter AIT devices. Accordingly, in order to meet the statutory and regulatory obligations attendant to preparing and issuing an NPRM for the AIT Rulemaking, these fast-paced changes and developments

regarding the AIT program had to be assessed for their impact on the rulemaking effort and, where necessary, accounted for in the rule text, preamble, or regulatory analysis.

11. Given these challenges, in my role as Assistant Administrator, I directed TSA's Regulatory and Economic Analysis Division (REA) to accord a very high priority to completing the analyses required for the notice-and-comment rulemaking process required by this Court's Opinion, including their prioritization over similar efforts for existing congressional rulemaking mandates.

12. TSA has made substantial progress on the AIT Rulemaking in accordance with this Court's Opinion since the status reflected in the Clarkson Declaration. For example, TSA completed initial drafts of the rule text and preamble for the AIT Rulemaking by October 2011, and an initial draft of the regulatory analysis was completed by June 2012.

13. Significantly, TSA formally referred the rule and preamble to DHS on August 3, 2012, as well as a copy of the regulatory analysis that remained under discussion between TSA and DHS. In an effort to streamline the next stage of the NPRM preparation process, TSA first sought and incorporated some initial comments from DHS and the Department of Justice (DOJ) before their formal referral to DHS as part of a larger effort to expedite subsequent review and approval of the AIT Rulemaking by both DHS and the Office of Management and

Budget (OMB) (which solicits comments on proposed NPRMs from other departments and agencies within the Executive Branch as part of its review process).

14. In order to ensure that the AIT Rulemaking documents were completed and referred to DHS and OMB as quickly as possible – in keeping with this Court’s mandate – REA made the AIT Rulemaking a principal responsibility for all of its economists, and assigned one to that effort exclusively.

15. After work on the AIT Rulemaking began, however, REA suffered significant personnel losses, including the departure of the two lead economists assigned to this effort. In order to ensure that the AIT Rulemaking continued as swiftly as possible, I directed that REA bring in economists on a contract basis to work exclusively on the AIT Rulemaking in order to ensure that work continued following the departure of the lead economists.

16. More recently, in order to further expedite the finalization of the regulatory evaluation, I established a war room that brought together the operational subject matter experts and economists in order to allow for a continuous exchange of information regarding the AIT Rulemaking NPRM.

17. While simultaneously ensuring timely and appropriate progress on the AIT Rulemaking, TSA has continued to pursue the congressionally mandated rulemaking objectives set forth in the Clarkson Declaration. Although some of

those rulemakings have since been referred to OMB for its review (in large part because of the substantial efforts devoted to those rulemakings before this Court issued its Opinion), the regulatory analysis for the regulation directed at vulnerability assessments and security plans for over-the-road bus operators has been delayed because the AIT Rulemaking has commanded the vast majority of REA's available resources since July 2011.

18. In this instance, the regulatory analysis required for the AIT Rulemaking was further complicated by the fact that the AIT program was developed as a component of TSA's Passenger Screening Program (PSP), which coordinates the development and deployment of checkpoint screening technologies. Because AIT has already been deployed as part of PSP, historical information exists as to various costs associated with its use as a screening technology. Some of the critical cost information necessary for the AIT Rulemaking's regulatory analysis (such as maintenance costs for the AIT program as deployed), however, could not be isolated from the overall PSP data for these elements, as the PSP cost reporting did not itemize costs associated with particular technologies. As a result, the economists working on the AIT Rulemaking had to invest substantial time developing estimates for which portion of the undifferentiated data regarding the PSP as a whole was specifically attributable to AIT program.

19. In contrast, in a typical regulatory analysis process, the agency is able to provide the economists involved with readily available rule-specific cost estimates for the team's use in performing its analysis for the proposed regulation or activity. In this instance, however, the economists involved had to devote substantial efforts simply to estimate the AIT program's portion of certain aggregated PSP expenses before turning to the usual first steps in the regulatory analysis effort.

20. The difficulty presented by the available historical data for the AIT program is exacerbated by the fact that the guidelines for conducting a regulatory analysis rely on principles that are inapplicable to historical data, such as the discounting of future costs and annualizing costs at a constant rate of return. In particular, OMB's Circular A-4, which is the guidebook for performing the complicated regulatory analysis required for any rulemaking, presumes that agencies will be relying on projected estimates for their regulatory analyses only, and therefore offers no guidance for the inclusion of historical costs in an analytical approach that assumes only projected costs.

21. The completion of the AIT Rulemaking's regulatory analysis in less than a year's time is the fastest that such an analysis for an NPRM of this magnitude has been completed in my estimation.

22. The completion of an NPRM by TSA in approximately one year likewise reflects the high prioritization that the agency accorded to this rulemaking effort.

23. As indicated above, TSA has committed significant resources to advancing the AIT Rulemaking as quickly as possible and has placed it among its highest regulatory priorities. Both TSA and DHS are committed to expediting this rulemaking, and have been working aggressively over the past year to develop the NPRM for the AIT Rulemaking, as evidenced by the important and significant progress described above. In the rulemaking life cycle, one of the next important milestones will be the submission of the AIT Rulemaking documents to OMB for its review under Executive Order 12866. Given the current status of the rule and its supporting documents (including the regulatory analysis) as well as the information available at this time, I have been informed that the process of finalizing the AIT Rulemaking documents so that the NPRM may be published is expected to be complete by or before the end of February 2013.

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

Executed on August 29, 2012.
Arlington, Virginia



John P. Sammon
Assistant Administrator, Office of
Security Programs & Industry
Engagement
Transportation Security Administration
U.S. Department of Homeland Security