

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

In the Matter of
WARREN HAVENS,
JIMMY STOBAUGH,
INTELLIGENT TRANSPORTATION & MONITORING WIRELESS LLC,
SKYBRIDGE SPECTRUM FOUNDATION,
and
AMTS CONSORTIUM LLC
On Requests for Inspection of Records
FOIA Control Nos. 2007-002, 2007-139, 2007-177, 2007-178, 2007-382, 2007-403

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2009

Released: September 30, 2009

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order we deny applications for review, filed by Warren Havens, with respect to the six above-captioned Freedom of Information Act (FOIA) requests. We have elected to treat all of these matters in a single consolidated order, because the various applications for review raise a common issue: namely, whether the Commission should grant a waiver of FOIA processing fees. Although the specifics of each request are different, we conclude below with respect to all requests that no fee waiver should be granted, and that the Commission has not waived the applicability of FOIA Exemption 5.

2. The various applications for review relate to a complicated set of facts involving the filing of six separate FOIA requests. Four of the requests (Nos. 2007-002, 2007-139, 2007-177, and 2007-178) concern an interrelated set of facts and are addressed, explicitly or by incorporation, in the same application for review. FOIA requests No. 2007-382 and 2007-403 concern a distinct set of facts, and each is addressed in separate applications for review. Accordingly, we will address the four related FOIAs, FOIA No. 2007-382, and FOIA No. 2007-403 separately, in the chronological order in which they were filed.

1 Havens filed the applications for review in his own right and as president of Intelligent Transportation & Monitoring Wireless LLC (Intelligent Transportation), Skybridge Spectrum Foundation (Skybridge), and AMTS Consortium LLC (AMTS Consortium), et al.

## II. FOIA Requests Nos. 2007-002, 2007-139, 2007-177, and 2007-178

### A. Background

3. On September 26, 2006, AMTS Consortium<sup>2</sup> submitted a FOIA request asking for documents about an Automated Maritime Telecommunications System (AMTS) license for Station WQA216 held by a company called Paging Systems, Inc. (PSI), and about any other PSI AMTS applications or authorizations.<sup>3</sup> The Wireless Telecommunications Bureau (WTB) responded on January 19, 2007, releasing 124 documents.<sup>4</sup> Because processing costs were minimal, no fees were charged in connection with this FOIA request.<sup>5</sup> In the meantime, on January 15, 2007, Havens, on behalf of AMTS Consortium, submitted a new FOIA request, FOIA No. 2007-139, seeking information about the reasons why WTB did not respond to its earlier FOIA request (FOIA No. 2007-002) within the 20 day statutory time period and information that otherwise related to the processing of the FOIA request.<sup>6</sup> WTB responded to the latter FOIA request on March 15, 2007<sup>7</sup> and, without charging any fees, released four additional pages of documents and withheld 22 internal FCC e-mails under FOIA Exemption 5 because they reflected the Commission's deliberative processes.<sup>8</sup>

4. During this same period, Havens-related entities filed two more FOIA requests seeking information relating to the AMTS service. By FOIA Request 2007-177,<sup>9</sup> Havens sought, on behalf of Intelligent Transportation, Skybridge, and AMTS Consortium,<sup>10</sup> information concerning the engineering procedures used to determine coverage and other technical requirements in processing AMTS applications. WTB responded to this FOIA request on April 3, 2007.<sup>11</sup> WTB released a copy of a technical document referred to by Havens as the "Eckert

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<sup>2</sup> The request was filed by Jimmy Stobaugh, AMTS Consortium's general manager.

<sup>3</sup> E-mail from AMTS Consortium LLC to FOIA (Sept. 26, 2006) (FOIA No. 2007-002).

<sup>4</sup> Letter from Roger Noel, Chief, Mobility Division, WTB to Mr. Jimmy Stobaugh and Mr. Warren Havens, AMTS Consortium LLC (Jan. 19, 2007) (FOIA No. 2007-002). As noted below, AMTS Consortium, on January 15, 2007, filed an appeal and a further FOIA request (FOIA No. 2007-139) seeking information on why WTB had not responded to its initial FOIA request. To the extent that the January 15 submission was an appeal of the Bureau's inaction on FOIA No. 2007-002, WTB determined that its January 19 response rendered moot AMTS Consortium's appeal. We agree that AMTS Consortium's appeal is moot, and dismiss it accordingly.

<sup>5</sup> *Id.* See 47 C.F.R. § 0.470(f).

<sup>6</sup> E-mail from Warren Havens to FOIA (Jan. 15, 2007) (FOIA No. 2007-139).

See 5 U.S.C. § 552(a)(6)(A)(i) (statutory time period). See also 47 C.F.R. § 0.461(g).

<sup>7</sup> Letter from Roger Noel, Chief, Mobility Division, WTB to Mr. Warren Havens (Mar. 15, 2007) (FOIA No. 2007-139).

<sup>8</sup> *Id.* See FOIA Exemption 5, 5 U.S.C. §552(b)(5), which covers "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." Exemption 5 encompasses the deliberative process privilege. See *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975).

<sup>9</sup> E-mail from Intelligent Transportation & Monitoring Wireless LLC to FOIA (Feb. 17, 2007) (FCC No. 2007-177).

<sup>10</sup> Havens also lists Jimmy Stobaugh, the general manager of these entities, as a requester.

<sup>11</sup> Letter from Thomas P. Derenge, Deputy Chief, Mobility Division, WTB to Mr. Warren Havens (Apr. 3, 2007) (FOIA No. 2007-177).

Report,”<sup>12</sup> but did not locate any other responsive documents, except for material routinely available on the Commission’s website or at the Commission.<sup>13</sup> WTB charged search fees of \$431.52.<sup>14</sup> By FOIA Request 2007-178, Havens, on behalf of Skybridge, Intelligent Transportation, and AMTS Consortium, sought information concerning a 2002 amendment of 47 C.F.R. § 80.475(a), which relates to AMTS authorizations.<sup>15</sup> WTB also responded to this FOIA request by a separate letter on April 3, 2007.<sup>16</sup> WTB did not locate any responsive documents, except for material routinely available to the public on the Commission’s website or at the Commission’s public reference rooms.<sup>17</sup> WTB charged search fees of \$287.68 for purposes of the last request.<sup>18</sup>

## B. Application for Review

5. As we understand his application for review,<sup>19</sup> Havens complains that the responses to FOIA No. 2007-177 and 2007-178 were untimely. He alleges that although the responses were dated April 3, 2007, they were postmarked April 5.<sup>20</sup> He also asserts that WTB did not have good cause for granting extensions of the response period and that Havens’s requests should have been given expedited treatment. Because of this alleged untimeliness, Havens contends that the fees for processing his FOIA requests should be waived.<sup>21</sup> Havens further contends that the WTB’s letters are unresponsive to his requests<sup>22</sup> and, for that additional reason, the fees should be waived.

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<sup>12</sup> The “Eckert Report” describes a model for applicants to use in performing required engineering analysis. See *Amendment of Parts 2 and 80 of the Commission’s Rules Applicable to Automated Maritime Telecommunications Systems (AMTS)*, 6 FCC Rcd 437 ¶ 6 (1991).

<sup>13</sup> Letter from Thomas P. Derenge, Deputy Chief, Mobility Division, WTB to Mr. Warren Havens (Apr. 3, 2007) (FOIA No. 2007-177).

<sup>14</sup> *Id.*

<sup>15</sup> E-mail from Skybridge Spectrum Foundation to FOIA (Feb. 17, 2007) (FOIA No. 2007-178). The rule was amended pursuant to *Amendment of the Commission’s Rules Concerning Maritime Communications*, 19 FCC Rcd 9918 (2002).

<sup>16</sup> Letter from Thomas P. Derenge, Deputy Chief, Mobility Division, WTB to Mr. Warren Havens (Apr. 3, 2007) (FOIA No. 2007-178).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> E-mail from Warren Havens to FCC FOIA Appeals Officers (May 3, 2007) (5/3 AFR). The application for review attaches and incorporates by reference an earlier pleading, dated April 4, 2007 (Attachment). The Attachment (at 7-8) also identifies Jimmy Stobaugh (*see infra*) and Telesaurus Holdings GB LLC as parties. In addition to seeking review, the attachment contained a new FOIA request by Havens, Skybridge, Intelligent Transportation, and AMTS Consortium, seeking information about delays in responding to FOIA Nos. 2007-139, 2007-177, and 2007-178 and otherwise about the processing of these FOIA requests. E-mail from Warren Havens to FCC FOIA Public Liaison (Apr. 4, 2007) (FOIA No. 2007-247). WTB responded to this latest FOIA on May 2, 2007. Letter from Roger Noel, Chief, Mobility Division, WTB to Mr. Warren Havens, President (May 2, 2007) (FOIA No. 2007-247).

<sup>20</sup> 5/3 AFR at 1.

<sup>21</sup> *Id.* at 1-2, Attachment at 7.

<sup>22</sup> Havens asserts that WTB did not provide the records he requested and further asserts that the Eckert Report is unresponsive to his requests.

6. Additionally, Havens asserts that the Commission's staff has engaged in prejudicial and unfair conduct to hamper Havens's right to petition the government in Commission proceedings, in violation of the Commission's rules, the Communications Act, and the First Amendment to the United States Constitution.<sup>23</sup> The alleged misconduct includes engaging in impermissible ex parte communications, unlawfully withholding records under the FOIA, unlawfully amending the Commission's rules, and fraudulently asserting that engineering studies were conducted.<sup>24</sup> Havens argues that this misconduct bars the Commission from withholding incriminating documents under FOIA Exemption 5.<sup>25</sup> At a minimum, Havens maintains that the Commission should furnish a list of all withheld documents.<sup>26</sup>

### C. Discussion

7. We deny the Application for Review. We find no basis to waive either Havens's processing fees or the application of FOIA Exemption 5 as Havens suggests. The FOIA provides that we must charge fees for the processing of FOIA requests<sup>27</sup> and that fees may be waived "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."<sup>28</sup> The FOIA, as applicable to Havens's requests, provides no other basis for waiving processing fees,<sup>29</sup> such as the alleged untimeliness<sup>30</sup> of the agency's response. Consistent with this analysis, the United States Court of Appeals for the Fourth Circuit in *Pollack v. Dep't of Justice*<sup>31</sup> held that the failure of the Department of Justice

<sup>23</sup> 5/3 AFR at 2, Attachment at 5-6.

<sup>24</sup> *Id.*

<sup>25</sup> Havens initially made these arguments in his FOIA requests Nos. 2007-177 and 2007-178. See notes 9 and 15, *supra*.

<sup>26</sup> 5/3 AFR at 2.

<sup>27</sup> See 5 U.S.C. § 552(a)(4)(A). The Commission's rules relating to FOIA processing fees are found at 47 C.F.R. §§ 0.466-70.

<sup>28</sup> 5 U.S.C. § 552(a)(4)(iii). See also 47 C.F.R. § 0.470(e).

<sup>29</sup> For example, a waiver cannot be justified on the basis of the requester's indigence or personal interest in the records requested, because to do so would be inconsistent with the public interest standard set forth in the statute. See *Ely v. U.S. Postal Service*, 753 F.2d 163, 165 (D.C. Cir. 1985) (indigence); *McClain v. U.S. Dep't of Justice*, 13 F.3d 220, 221 (7th Cir. 1993) (personal interest).

<sup>30</sup> Because WTB has responded to Havens's various FOIAs, Havens's complaints of untimeliness, apart from his contention that he is entitled to a waiver of fees, are moot. See *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 63-64 (D.C. Cir. 1990) (exhaustion of administrative remedies required where agency failed to respond to FOIA request during statutory period, but responded before commencement of judicial review). Accordingly, we need not further address Havens's allegations that WTB should have responded more rapidly. The Commission and its staff make every effort to act within the statutory time period. See 47 C.F.R. § 0.461(g). See also *Jeffrey W. Hanson*, 16 FCC Rcd 16497, 16499 ¶ 7 (2001) (noting that delays sometime occur in processing FOIA requests).

Pursuant to the 2007 amendments to the FOIA, an agency may not assess search fees against a requester if the agency has failed to comply with a statutory time limit under some circumstances. See *Openness Promotes Effectiveness In Our Government Act of 2007*, Pub. L. 110-175 (Dec. 31, 2007) at § 6(b)(1)(A). This provision, however, applies only to FOIA requests filed on or after the effective date of the Act. *Id.* at § 6(b)(2). Because Havens's FOIA requests predated the effective date of the Act, the provision in question has no relevance here.

<sup>31</sup> 49 F.3d 115, 119-20 (4th Cir. 1995).

(DOJ) to make a timely response to a FOIA request did not excuse the requester from having to make a required advance fee payment before it brought judicial action against DOJ. The court held: “Nowhere in the statute . . . can we find a provision which states that when an agency acts untimely, it is obliged to provide the requester unlimited documentation free of charge.”<sup>32</sup> Moreover, Havens’s dissatisfaction with WTB’s responses<sup>33</sup> does not warrant nonpayment of fees. A requester must pay the statutory fees even if the requester is dissatisfied with the information disclosed by the agency.<sup>34</sup>

8. The materials withheld under Exemption 5 consist of e-mails containing the advice and recommendations regarding the handling of Havens’s FOIA requests.<sup>35</sup> Such deliberative materials clearly fall within the scope of Exemption 5 and were properly withheld.<sup>36</sup> Havens’s unsubstantiated allegations of misconduct or mistreatment by Commission staff provide no basis to avoid application of Exemption 5.<sup>37</sup> Only one of Havens’s allegations is relevant to this FOIA AFR – *i.e.*, that WTB’s responses to his initial FOIA requests were delayed beyond the statutory deadline. Such delays, while unfortunate, do not estop an agency from relying on a FOIA exemption.<sup>38</sup> Further, the fact that Havens has a specific reason for requesting the material, *i.e.*, to explore WTB’s alleged violations, does not give him any greater entitlement to receive it. For purposes of the FOIA, any member of the public has as much right to disclosure of a record as a person with a special interest in the record requested.<sup>39</sup> The identity of the requester and the

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<sup>32</sup> *Id.*

<sup>33</sup> Havens suggests that “By review of the two requests . . . compared with the Letters [*i.e.*, WTB’s responses], it can be seen what was not responded to . . . .” 5/3 AFR at 2. This vague assertion, in the absence of a more specific explanation, provides no basis for review. In any event, we have reviewed the requests and WTB’s responses and conclude that WTB was responsive.

<sup>34</sup> See *Stabasefski v. United States*, 919 F. Supp. 1570, 1573 (M.D.Ga. 1996) (the FOIA does not contemplate the reimbursement of fees where material is withheld as exempt); *Linn v. U.S. Dep’t of Justice*, reported at 1995 WL 417810 at \*13 (D.D.C. June 6, 1995) (requester is liable for search fees even where requested documents are not produced). See also *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 Fed. Reg. 10012, 10019 (Mar. 27, 1987) (agencies are entitled to charge requesters for an unsuccessful search). This principle is codified in the Commission’s rules at 47 C.F.R. § 0.467(b).

<sup>35</sup> See Letter from Roger Noel, Chief, Mobility Division, WTB to Mr. Warren Havens (Mar. 15, 2007) (FOIA No. 2007-139).

<sup>36</sup> See note 8, *supra*. See also *NLRB v. Sears Roebuck & Co.*, 421 U.S. at 149 (Exemption 5 protects deliberative material, disclosure of which would inhibit the frank discussion of legal and policy matters and result in poorer decisions and policies).

<sup>37</sup> Our review of the withheld material discloses no indication that WTB abused Exemption 5, for example, by selectively disclosing material that reflects positively on the agency, while withholding material that does not reflect positively. See *Powell v. U.S. Dep’t of Justice*, 584 F. Supp. 1508, 1520-21 (N.D. Cal. 1984) (such abusive conduct would be contrary to the FOIA’s intention of facilitating disclosure of agency misconduct and might be grounds for finding a waiver of Exemption 5). In support of his argument that the Commission has waived Exemption 5, Havens cites *Cooper v. Dep’t of the Navy*, 594 F.2d 484 (5th Cir. 1979); *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177 (8th Cir. 1978); and *Education/Instrucción, Inc. v. U.S. Dep’t of Housing and Urban Development*, 471 F. Supp. 1074 (D. Mass. 1979). In each of these cases, the relevant agency was found to have waived Exemption 5 based on prior disclosure of the withheld material to third parties. Because no such prior disclosure is involved here, these cases are inapposite.

<sup>38</sup> See note 37, *supra*.

<sup>39</sup> See *U.S. Dep’t of Defense v. FLRA*, 510 U.S. 487, 496 (1994).

purposes for which the request is made have no bearing on the merits of the FOIA request.<sup>40</sup> Thus, the reason that Havens thinks he is entitled to the information and the uses to which he intends to put the information are irrelevant to whether the records should be disclosed under the FOIA. If the records Havens seeks may be withheld under Exemption 5 from any member of the public, they may be withheld from Havens.

9. As an additional matter, Havens is not entitled to a list of withheld documents.<sup>41</sup> It is well established that such a “Vaughn Index”<sup>42</sup> is not required at the administrative level, and we do not customarily prepare one.<sup>43</sup> An agency need only provide “a sufficiently detailed description of what it is refusing to produce and why so that the requestor and the court can have a fair idea what the agency is refusing to produce and why.”<sup>44</sup> This may be accomplished without a detailed index of the records, and we have done so here.

### III. FOIA Request No. 2007-382

#### A. Background

10. On May 10, 2007, the Chief, Mobility Division of WTB wrote<sup>45</sup> to Havens, asking him to provide date-stamped copies of pleadings that he filed (1) in the matter of an AMTS renewal application filed by Mobex Network Service LLC (Mobex)<sup>46</sup> and (2) with respect to a request for waiver regarding VHF Public Coast Service (VPC) licenses. Subsequently, on May 18, 2007, WTB clarified that it (i) sought copies of five pleadings that it believed Havens to have filed, (ii) had copies of five other pleadings, and (iii) also sought any other Mobex-related documents in Havens’s possession.<sup>47</sup> WTB specifically requested, with respect to the VPC-related documents, that Havens provide any documents relating to licenses assigned to Telesaurus VPC, LLC, an entity with which he is affiliated.<sup>48</sup>

11. Havens responded by filing a FOIA request on behalf of Skybridge.<sup>49</sup> Skybridge sought copies of (a) the filings described in the May 18, 2007 letter, (b) documents showing the day and time of receipt of the filings and the FCC employee who logged this information, (c) documents indicating the FCC staff with responsibility for receiving and maintaining these filings

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<sup>40</sup> *Id.*

<sup>41</sup> 5/3 AFR at 2.

<sup>42</sup> *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

<sup>43</sup> *See Wireless Consumer Alliance*, 20 FCC Rcd 3874, 3878 ¶ 11 (2005), *citing Schwarz v. U.S. Dep’t of Treasury*, 131 F. Supp.2d 142, 147 (D.D.C. 2000), *aff’d*, No. 00-5453 (D.C. Cir. 2001), *reported at* 2001 WL 674636.

<sup>44</sup> *Wireless Consumer Alliance*, 20 FCC Rcd at 3878 ¶ 11, *quoting Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999).

<sup>45</sup> Letter from Roger S. Noel, Chief, Mobility Division to Mr. Warren Havens, President (May 10, 2007).

<sup>46</sup> More specifically, WTB sought pleadings related to review of *Applications of Mobex Network Services LLC for Automated Maritime Telecommunications Systems (Order on Reconsideration)*, 20 FCC Rcd 14813 (WTB 2005).

<sup>47</sup> Letter from Roger S. Noel, Chief, Mobility Division to Mr. Warren Havens, President (May 18, 2007) at 1-2.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> E-mail from Warren Havens to FOIA (May 22, 2007) (FOIA No. 2007-382) (FOIA Request 2007-382).

and documents showing any events of receipt and filing including system or procedural failures, and (d) all internal communications regarding WTB's letters and the filings they described.<sup>50</sup> Skybridge sought a waiver of FOIA processing fees and expedited action. In the event the Commission denied the fee waiver, Skybridge indicated it would pay "reasonable charges" and asked to be classified as an "educational and non-commercial scientific institution" requester for fee purposes. Additionally, Skybridge complained that WTB's May information request was "an unjustified and discriminatory search and seizure."<sup>51</sup>

12. The Commission responded to the FOIA request in separate actions. On June 11, 2007, the Office of General Counsel (OGC) denied the request for fee waiver.<sup>52</sup> On June 21, 2007, the date that the response to the FOIA request would otherwise be due, WTB extended the due date by five working days to June 28, 2007, pursuant to 47 C.F.R. § 0.461(g), which provides for extensions of up to 10 business days.<sup>53</sup> In its June 28 response, WTB released 131 pages of documents.<sup>54</sup> With respect to request (a) described in the previous paragraph, WTB provided 124 pages of pleadings and otherwise referred Havens to information contained in the Commission's Universal Licensing System.<sup>55</sup> WTB provided various information, including seven pages of documents, in response to requests (b) and (c).<sup>56</sup> WTB withheld all records responsive to request (d) under the deliberative process prong of FOIA Exemption 5.<sup>57</sup> WTB also classified Skybridge as a commercial requester and assessed \$433.61 in search and duplications fees.<sup>58</sup>

### **B. Applications for Review and Discussion**

13. Now pending before the Commission are two applications for review filed by Skybridge. In its first application for review,<sup>59</sup> Skybridge contends that WTB's action extending the due date by five working days did not comply with the provisions of the FOIA regarding extensions of time, and WTB's failure to make a substantive response on June 21 therefore constituted a denial of its FOIA request. Skybridge's contentions miss the mark. In extending the due date, WTB explained that it was "necessary to search for and collect records from a number of Commission offices . . . that are separate from the Commission office processing the request."<sup>60</sup> This is appropriate under the Commission's rules, and thus WTB's grant of a five

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<sup>50</sup> *Id.* at 1-2. Havens contended that the Commission had waived any privilege associated with these internal communications because they had previously been disclosed.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> Letter from Joel Kaufman, Associate General Counsel to Warren Havens, Director (June 11, 2007) (6/11 Waiver Denial).

<sup>53</sup> E-mail from Allen Barna to Warren Havens (June 21, 2007).

<sup>54</sup> Letter from Roger S. Noel, Chief, Mobility Division to Mr. Warren Havens, President and Mr. Jimmy Stobaugh, Assistant Manager (June 28, 2007).

<sup>55</sup> *Id.* at 2-3.

<sup>56</sup> *Id.* at 3-4.

<sup>57</sup> *Id.* at 4-6. WTB rejected Skybridge's assertion that any of these documents had been publicly disclosed, stating that Skybridge gave no evidence of disclosure and that WTB was not aware of any disclosures. *Id.* at 4-5 n.4.

<sup>58</sup> *Id.* at 6.

<sup>59</sup> E-mail from Warren Havens, Manager to FCC FOIA Administrative Appeals Officers (June 22, 2007).

<sup>60</sup> E-mail from Allen Barna, Mobility Division, WTB to Warren Havens (June 21, 2007).

working day extension did not constitute a denial of Skybridge's request.<sup>61</sup> In any case, because WTB did make a substantive response on June 28, Skybridge's application for review is moot and will be dismissed.<sup>62</sup>

14. In its second application for review,<sup>63</sup> Skybridge seeks review of OGC's action denying its fee waiver. OGC denied the fee waiver request on the grounds that Skybridge had failed to demonstrate, as required by the FOIA and the Commission's rules, that "disclosure of the information [requested] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."<sup>64</sup> OGC found that Skybridge made no attempt to explain how release of the requested records would shed light on the government's actions.<sup>65</sup> OGC also found that Skybridge failed to explain how it intended to make the requested information available to the public.<sup>66</sup>

15. Skybridge's application for review provides no basis for reversing OGC's denial of a fee waiver. The application for review again provides no specific explanation as to how disclosure of the information requested would shed light on the government's operations or activities or of Skybridge's specific plans for disseminating the information. Skybridge instead contends that case law indicates that "a nonprofit can clarify the purpose of its FOIA request for purposes of fee waiver requests."<sup>67</sup> Skybridge explains:

Skybridge was established . . . to undertake nonprofit activity concerning high public interest wireless in the nation with FCC licensed and unlicensed spectrum in the US for all purposes described [at its and affiliated entities' website]. In addition, Skybridge was established to carry out the purposes of legal defense related to such public-interest wireless, including challenges to FCC decisions adverse to [entities affiliated with Skybridge] and other entities['] attempts to obtain and use FCC licenses for these purposes, and to certain aspect[s] of FCC structure and practice that Skybridge believes are contrary to the US Constitution.<sup>68</sup>

Skybridge's AFR also states that it will publicize the requested information using Internet websites, the trade press, and other means, but it provides no specifics.<sup>69</sup>

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<sup>61</sup> See 47 C.F.R. § 0.461(g)(1).

<sup>62</sup> See note 30, *supra*.

<sup>63</sup> E-mail from Warren Havens, Manager to FCC FOIA Administrative Appeals officers (Jul. 11, 2007) (7/11 AFR).

<sup>64</sup> See 5 U.S.C. § 552(a)(4)(A)(iii); 47 C.F.R. § 0.470(e).

<sup>65</sup> 6/11 Waiver Denial at 1, *citing McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (*MESS*) (requiring an explanation with "reasonable specificity how disclosure will contribute to public understanding").

<sup>66</sup> *Id.* at 1-2, *citing Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (absence of specific information regarding ability to disseminate requested information is grounds for denying a fee waiver).

<sup>67</sup> 7/11 AFR at 1.

<sup>68</sup> *Id.* at 1-2.

<sup>69</sup> *Id.* at 2.

16. The fact that Skybridge is a nonprofit organization does not relieve it of the need to satisfy the statutory standard of explaining with specificity how disclosure of the requested information would contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.<sup>70</sup> Even the case relied on by Skybridge, *Forest Guardians v. U.S. Dep't of the Interior*,<sup>71</sup> makes this quite clear. In that case, the court reversed the denial of a fee waiver to a nonprofit organization based on the requester's showing that the requested records could lead to an understanding of how the Department of the Interior's Bureau of Land Management (BLM) makes policy decisions, including the influence of outside groups on this process.<sup>72</sup> By contrast, Skybridge's generalized statement of its purpose fails to demonstrate specifically how the records requested would contribute to public understanding of government including specifically how the material would be disseminated. Moreover, Skybridge's own description of its purpose includes the legal defense of affiliated commercial entities, which is potentially inconsistent with the statutory requirement for a fee waiver that the request not primarily be in the commercial interest of the requester.<sup>73</sup> In this regard, the fact that Skybridge itself is a nonprofit organization does not bar a finding that it has a commercial purpose, in that it is acting for the benefit of its commercial affiliates.<sup>74</sup>

#### IV. FOIA Request No. 2007-403

##### A. Background

17. In this FOIA request,<sup>75</sup> Skybridge sought documents related to Cornerstone SMR, an applicant in FCC Auction No. 72, for Phase II 220 MHz service spectrum licenses,<sup>76</sup> and documents that explain or reflect a declaratory ruling relating to certain procedural aspects of Auction No. 72.<sup>77</sup> Skybridge sought expedited action and a waiver of FOIA processing fees. As to the latter request, Skybridge offered to pay "reasonable charges" assessed for satisfying the

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<sup>70</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>71</sup> 416 F.3d 1173, 1178 (10th Cir. 2005) ("noncommercial public interest groups must still satisfy the statutory standard to obtain a fee waiver"), citing *MESS*, 835 F.2d at 1284.

<sup>72</sup> *Id.* at 1179-80. More specifically, the requester sought records documenting BLM's policy of facilitating the collateralization of grazing permits on public lands and how this policy was influenced by special interest groups.

<sup>73</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>74</sup> See *VoteHemp, Inc. v. DEA*, 237 F.Supp.2d 55, 64-65 (D.D.C. 2002) (finding that a nonprofit organization that advocated the deregulation and free market for industrial hemp for the benefit of the commercial hemp industry had commercial purpose). In its FOIA request, Skybridge indicates that it was founded and funded by the interest holders in Intelligent Transportation & Wireless LLC, AMTS Consortium LLC, Telesaurus GB LLC, and Telesaurus VPC LLC. FOIA Request (2007-382) at 1.

<sup>75</sup> E-mail from Warren Havens to FOIA (June 7, 2007), corrected (June 9, 2007) (FOIA No. 2007-403) FOIA Request (2007-403).

<sup>76</sup> See *Public Notice*, DA 07-2846 (Jul. 3, 2007).

<sup>77</sup> See Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division to Warren C. Havens, DA 07-2328 (June 5, 2007).

request, if the fee waiver was denied, and asked to be classified as an “educational and non-commercial scientific institution” for fee purposes.<sup>78</sup>

18. OGC denied Skybridge’s request for a fee waiver.<sup>79</sup> OGC denied the request on the grounds that Skybridge had failed to demonstrate, as required by the FOIA and the Commission’s rules, that “disclosure of the information [requested] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>80</sup> OGC found that the request appeared to seek information on behalf of the private interests of participants in Auction No. 72, in particular the companies that established and funded Skybridge.<sup>81</sup> OGC also found that Skybridge failed to explain how it intended to make the information available to the public.<sup>82</sup>

19. Subsequently, WTB issued a letter ruling on October 15, 2007, dealing with several aspects of Skybridge’s FOIA request.<sup>83</sup> The ruling: (1) found that Skybridge’s FOIA request did not reasonably describe the records requested and directed Skybridge to clarify its request within 14 days;<sup>84</sup> (2) found that Skybridge and its affiliates had previously failed to pay FOIA fees in a timely manner, and, accordingly, ordered Skybridge to make advance payment of all overdue fees (plus interest) and estimated fees of \$2,897.22 before its request would be processed;<sup>85</sup> and (3) found that Skybridge was not entitled to restricted fees as a “non-commercial scientific institution” or an “educational institution.”<sup>86</sup>

## B. Applications for Review and Discussion

20. Skybridge filed applications for review of OGC’s denial of its fee waiver request and of WTB’s subsequent ruling. Skybridge’s July 19 application for review<sup>87</sup> is essentially identical to its July 11 application for review of the denial of its earlier request for a fee waiver filed with respect to FOIA No. 2007-382 described above.<sup>88</sup> Thus, the foregoing analysis of the earlier application for review<sup>89</sup> applies with equal force to this application for review. The only additional support that Skybridge offers in its more recent pleading is its reliance on *Judicial*

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<sup>78</sup> FOIA Request (2007-403) at 2.

<sup>79</sup> Letter from Joel Kaufman, Associate General Counsel to Warren Havens, Director (June 19, 2007) (6/19 Waiver Denial).

<sup>80</sup> See 5 U.S.C. § 552(a)(4)(A)(iii); 47 C.F.R. § 0.470(e).

<sup>81</sup> 6/19 Waiver Denial at 2.

<sup>82</sup> *Id.*

<sup>83</sup> Letter from Gary D. Michaels, Deputy Chief, Auction and Spectrum Access Division, WTB to Warren Havens, Director (Oct. 15, 2007) (10/15 Ruling).

<sup>84</sup> 10/15 Ruling at 1-2.

<sup>85</sup> *Id.* at 2-3. See 47 C.F.R. § 0.469(a)(2) (providing for advance payment where a requester has previously failed to pay fees in a timely fashion).

<sup>86</sup> 10/15 Ruling at 3.

<sup>87</sup> E-mail from Warren C. Havens, Manager to FCC FOIA Administrative Appeals Officers (Jul. 19, 2007).

<sup>88</sup> See paragraph 15, *supra*.

<sup>89</sup> See paragraph 16, *supra*.

*Watch, Inc. v. Dep't of Justice*,<sup>90</sup> in addition to *Forest Guardians*. Skybridge does not, however, explain how that case supports its position, and we fail to see its relevance.<sup>91</sup> Accordingly, we find no basis to overturn OGC's denial of Havens's fee waiver request.

21. We will dismiss Skybridge's Nov. 16, 2007 application for review,<sup>92</sup> which appeals in a conclusory fashion WTB's October 15 Ruling, as procedurally defective. Effective September 25, 2007, the Commission rescinded interim authority for parties to file applications for review electronically.<sup>93</sup> Skybridge's e-mail application for review is therefore not acceptable. In any event, the arguments made within the application for review lack merit. First, Skybridge contends that it should not be held accountable for the lack of timely fee payment by "other legal entities," *i.e.*, its affiliates. Skybridge's request, however, identifies the entities in question as having established and funded Skybridge. Moreover, the various filings with respect to the FOIA requests discussed herein indicate that Skybridge and its affiliates share common management -- in particular, Havens -- and that Skybridge filed its FOIA requests for the benefit of its affiliates.<sup>94</sup> Under these circumstances, we think it entirely reasonable to take into account the payment history of Skybridge's affiliates in applying the advance payment provision of our rules. Second, Skybridge contests WTB's ruling denying it status as a "non-commercial scientific institution" or an "educational institution." As described above,<sup>95</sup> Skybridge has failed to demonstrate that its request is not primarily in the commercial interests of its affiliates.<sup>96</sup>

### C. Discretionary Release and Segregability

22. We have examined the records at issue here to determine whether any additional portions could be segregated and released, or whether we should as a matter of our discretion release the records we have found are exempt from disclosure under the FOIA.<sup>97</sup> We have reviewed the records responsive to Haven's requests to determine whether any additional portions may be segregated and released, and have found none. Accordingly, our disposition fulfills the mandate of the FOIA and Attorney General Holder's FOIA Memo to release segregable portions

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<sup>90</sup> 365 F.3d 1108, 1126-27 (D.C. Cir. 2004).

<sup>91</sup> In *Judicial Watch*, a nonprofit organization sought records relating to former President Clinton's exercise of his power to grant pardons. The United States Court of Appeals for the District of Columbia Circuit held that the organization was not entitled to a blanket fee waiver because many of the documents requested were publicly available, but did not reach the question of whether a fee waiver might be granted with respect to certain documents. *Id.* at 1127.

<sup>92</sup> E-mail from Warren C. Havens, Manager to FCC FOIA Appeals Officers (Nov. 16, 2007).

<sup>93</sup> *Interim Electronic Filing Procedures for Certain Commission Filings*, 72 Fed. Reg. 35189 (June 27, 2007).

<sup>94</sup> FOIA Request (2007-403) at 1. *See also* paragraph 15, *supra*.

<sup>95</sup> *See* paragraph 15 & 16, *supra*.

<sup>96</sup> Skybridge also challenges WTB's directive that Skybridge clarify its request. Such requests for clarification are appropriate under the FOIA. *See Halpern v. FBI*, 181 F.3d 279, 289 (2d Cir. 1999) (on facts of the case, it was reasonable for agency to ask requester to clarify the request). Additionally, Skybridge complains about delay in the issuance of the 10/15 Ruling. As noted above, such complaints are mooted by the issuance of the ruling. *See* note 30, *supra*.

<sup>97</sup> *See Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed. Reg. 4683 (2009) (President Obama's memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder's FOIA Memo).

of the records. Moreover, while it is true that “[e]ven when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds,”<sup>98</sup> we decline to exercise our discretion to do so here. We do not discern any overriding public interest in releasing the records that we have determined are exempt from disclosure under FOIA Exemption 5 given the harm to the integrity of the Commission’s processes that would result from release of those records.<sup>99</sup>

## V. Ordering Clauses

23. IT IS ORDERED that the applications for review filed on January 15, 2007 by AMTS Consortium LLC and on June 22, 2007 by Skybridge Spectrum Foundation ARE DISMISSED as moot, and that the application for review filed November 16, 2007 by Skybridge Spectrum Foundation IS DISMISSED as procedurally defective.

24. IT IS ORDERED that the applications for review, filed May 3, 2007, July 11, 2007, and July 19, 2007 by Warren Havens ARE DENIED. Havens may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).

25. The following officials are responsible for this action: Chairman Genachowski, and Commissioners Copps, McDowell, Clyburn, and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>98</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818 (1998), *citing Chrysler Corp.*, 441 U.S. at 292-93. *See also* Attorney General Holder’s FOIA Memo, *supra*.

<sup>99</sup> See U.S. Department of Justice, Office of Information Policy, FOIA Post, President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines Creating a “New Era of Open Government,” (2009), available at <<http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>> (recognizing that discretionary release of records is less likely when the requirements of Exemption 4 are met for withholding records).