

**STATEMENT OF COMMISSIONER AJIT PAI
APPROVING IN PART AND DISSENTING IN PART**

Re: *Warren Havens*, FOIA Control Nos. 2014-650 and 2014-664; *Skybridge Spectrum Foundation*, FOIA Control Nos. 2014-651 and 2014-663.

The Commission has already sanctioned Warren Havens for abusing the FCC's processes by filing frivolous and repetitive pleadings.¹ And now, in this proceeding, I believe that he is abusing the FCC's FOIA process. He is seeking to obtain through FOIA requests material that he is not allowed to access because of a protective order in an adjudication to which he is a party. That protective order, which was issued by the presiding Administrative Law Judge (ALJ), permits Havens' counsel to access these documents by signing a non-disclosure agreement. However, it does not give Havens himself that same right; he can only ask the ALJ to publicly disclose material submitted under the protective order.

I can certainly understand why Havens would be unhappy with this state of affairs. But in my view, the Enforcement Bureau correctly rejected Havens' attempt to make an end-run around the ALJ's protective order. I therefore agree with the Commission's decision to affirm the Bureau's denial of Havens' two broadest FOIA requests, which "seek the wholesale disclosure of thousands of pages of documents submitted during discovery as confidential or highly confidential pursuant to the protective order."² As the *Order* states,

The Protective Order represents a calibrated balancing, approved by the ALJ and agreed to by the parties, designed to facilitate the submission of, access to, and use of confidential information in order to permit the parties, including [the Bureau], to prepare their cases for the hearing without the distraction of having to litigate ad hoc objections to claims of confidentiality. Granting the FOIA requests would bring about a profound alteration of the long-established process for agency ALJs to determine the manner in which parties would have access to discovery material in enforcement hearings. It potentially undercuts the ALJ's control of the discovery process, discourages the cooperation of the parties, and would occasion time-consuming separate litigation of the FOIA requests that would delay and disrupt the proceeding, thereby interfering with the fair and efficient resolution of the proceeding.³

For these same reasons, however, I disagree with the Commission's decision to revive Havens' two other FOIA requests, which seek confidential material contained in the Direct Case Exhibits used by the Enforcement Bureau in the adjudication. Were the Bureau to disclose this information to Havens, would it "undercut[] the ALJ's control of the discovery process"? Yes. That's because the Bureau would be providing him access to confidential documents without the ALJ's permission—even though the protective order explicitly requires that Havens ask the ALJ for access to them. Would granting such a FOIA request open the door to "time-consuming separate litigation" of FOIA requests filed by parties to adjudicatory proceedings "that would delay and disrupt the proceeding[s], thereby interfering with the fair

¹ See *Warren C. Havens Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas, and Applications to Provide Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado*, File Nos. 852997-853009, 853010-853014, Memorandum Opinion and Order, 27 FCC Rcd 2756, 2757, para. 1 (2012); *Warren C. Havens Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas, and Applications to Provide Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado*, File Nos. 852997-853009, 853010-853014, Third Order on Reconsideration, 26 FCC Rcd 10888, 10888, para. 1 (2011).

² *Order* at para. 10.

³ *Id.*

and efficient resolution of the proceeding[s]”? Yes. Indeed, given Havens’ long history with the Commission, I think there is a good chance that this *Order* will spawn a new series of more “limited” FOIA requests from Havens seeking information he has attempted to obtain through his broader requests. And were the Enforcement Bureau to release any of the information requested by Havens, would it disturb the protective order’s “calibrated balancing, approved by the ALJ and agreed to by the parties”? Once again, the answer is yes.

In my view, these harms are more than sufficient to justify withholding pursuant to Exemption 7(A) all of the documents requested by Havens. I therefore approve in part and dissent in part.