

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

In the Matter of )  
 )  
SKYBRIDGE SPECTRUM FOUNDATION ) FOIA Control Nos. 2009-089  
 )  
MARITIME COMMUNICATIONS/ )  
LAND MOBILE, LLC )  
 )  
SKYBRIDGE SPECTRUM FOUNDATION ) FOIA Control No. 2009-136  
 )  
PAGING SYSTEMS, INC. )  
 )  
On Requests for Inspection of Records and for )  
Confidential Treatment )

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 28, 2010**

**Released: August 3, 2010**

By the Commission:

**I. INTRODUCTION**

1. By this Memorandum Opinion and Order, we grant in part and deny in part applications for review filed by Skybridge Spectrum Foundation (Skybridge)<sup>1</sup> and Paging Systems, Inc. (PSI).<sup>2</sup> These AFRs seek review of rulings by the Wireline Competition Bureau

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<sup>1</sup> See (1) Request for Extension of Time to Appeal, and in the Alternative, Application for Review: Freedom of Information Act Action [FOIA No. 2009-089], filed September 22, 2009 by Skybridge (089 AFR) and (2) Request for Extension of Time to Appeal, and in the Alternative, Application for Review: Freedom of Information Act Action [FOIA No. 2009-136], filed September 23, 2009 by Skybridge (136 AFR). We have consolidated these matters because of the commonality of parties and issues. Skybridge filed a supplement to the 089 AFR. See December 2, 2009 Email Supplement to Skybridge Spectrum Foundation's Application for Review of Freedom of Information Act Action, filed December 7, 2009 (089 Supplement). Each of Skybridge's applications for review was opposed. See Opposition to Request for Extension of Time to Appeal, and in the Alternative, Application for Review: Freedom of Information Act Action, filed October 5, 2009, by Maritime Communications Land Mobile, LLC (MC/LM) (089 Opposition) and Opposition to Request for Extension of Time to Appeal, and in the Alternative, Application for Review: Freedom of Information Act Action, filed October 6, 2009, by PSI (136 Opposition).

<sup>2</sup> See Application for Review, filed September 8, 2009, by PSI (PSI AFR), and (1) Initial Opposition to PSI Application for Review, FOIA Control No. 2009-136 And Statement Regarding PSI Response to Skybridge Spectrum Foundation's Application for Review, FOIA Control No. 2009-136, filed September 30, 2009, by Skybridge (Skybridge Initial Opposition), and (2) Opposition to PSI Application for Review, FOIA Control No. 2009-136 And Request to Accept Late Filing if Deemed Necessary, filed October 9, 2009, by Skybridge (Skybridge Final Opposition).

(continued. . .)

(WCB)<sup>3</sup> on two Freedom of Information Act (FOIA) requests filed by Skybridge seeking information about the Universal Service Fund payment obligations of PSI and a second entity, Maritime Communications/Land Mobile, LLC (MC/LM).<sup>4</sup> In both cases, WCB withheld much of the requested material as confidential under FOIA Exemption 4 but released other material as not exempt. As explained more fully below, we find that WCB properly applied Exemption 4, and, accordingly, we will deny Skybridge's applications for review.<sup>5</sup> Similarly, we find that PSI's challenge to the manner in which WCB applied Exemption 4 is mostly without merit and will deny PSI's application for review except in two respects.

## II. FOIA 2009-089

### A. BACKGROUND

2. Skybridge requested the following classes of documents concerning MC/LM:<sup>6</sup>
  - a. a letter dated May 8, 2006, requesting refund of MC/LM's universal service fund contribution, addressed to the Universal Service Administrative Corporation (USAC) and any attachments;
  - b. information provided to USAC by MC/LM on August 14, 2006, in response to USAC's request for further information on June 30, 2006;
  - c. USAC's June 30, 2006 request for further information; and
  - d. copies of all FCC Forms 499-A and 499-Q filed by MC/LM from 2001-2006 and any accompanying documents.<sup>7</sup>

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<sup>3</sup> See Letter from Jeremy D. Marcus, Acting Associate Chief, WCB to Mr. Jimmy Stobaugh (Aug. 24, 2009) (089 Decision); Letter from Jeremy D. Marcus, Acting Associate Chief, WCB to Mr. Jimmy Stobaugh (Aug. 24, 2009) (136 Decision).

<sup>4</sup> See E-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Nov. 4, 2008) (089 Request); E-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Dec. 3, 2008) (136 Request).

<sup>5</sup> Skybridge filed an earlier application for review complaining that WCB had as yet failed to respond to Skybridge's FOIA requests. See Letter from Jimmy Stobaugh, General Manager to Shoko Hair, FCC FOIA Officer (Jun. 24, 2009). Because WCB has now responded to both requests, this application for review is moot and will be dismissed. A suggestion in the June 2009 pleading that Skybridge makes about fees will be considered in connection with the AFRs before us.

<sup>6</sup> See 089 Request at 1. MC/LM is the successor-in-interest to Waterways Communication System, LLC (Watercom) and Mobex Network Services, LLC (Mobex). See *Universal Service Contribution Methodology*, 23 FCC Rcd 12836, 12838-39 ¶ 5 (WCB 2008). Although the various documents relevant to Skybridge's request refer to Watercom and Mobex in addition to MC/LM, for the sake of clarity we will refer to "MC/LM" throughout.

<sup>7</sup> The Commission requires carriers and certain other providers of telecommunications services to report their revenues on a quarterly (Form 499-Q) and annual basis (Form 499-A) for purposes of calculating the filer's contribution to the Universal Service Fund (USF). See *Universal Service Contribution Methodology*, 23 FCC Rcd 17903, 17904 ¶¶ 2-3 (WCB 2008).

3. In its response, WCB held that 19 pages of documents should be released but that the other documents requested (as well as portions of the released documents) should be withheld pursuant to FOIA Exemption 4,<sup>8</sup> which applies to “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>9</sup> WCB withheld the Forms 499-A and 499-Q because they contained revenue information broken down by interstate and international revenues. WCB found that MC/LM did not report this information publicly and that the disclosure of this information could enable MC/LM’s competitors to determine MC/LM’s competitive position to MC/LM’s detriment.<sup>10</sup> For the same reason, WCB withheld checking account information,<sup>11</sup> invoice printouts reflecting contributor payment history and amount owed, and customer and network routing information.<sup>12</sup>

## B. APPLICATION FOR REVIEW AND DISCUSSION

4. **Application for Review.** In its application for review, Skybridge does not challenge WCB’s determination of competitive harm to MC/LM for purposes of applying Exemption 4. We see no basis in the record to question the competitive harm determination, and we will not address it further. Skybridge, however, urges the Commission to overturn WCB’s application of Exemption 4 for a different reason. According to Skybridge, MC/LM’s Forms 499-A and 499-Q, as well as other information submitted by MC/LM, contain false information and are therefore fraudulent.<sup>13</sup> According to Skybridge, the protection of Exemption 4 does not extend to fraudulent filings. Skybridge asserts that “[i]n this regard, as with the No[e]rr Pennington doctrine’s sham exception . . . a filing before a Federal agency that is a sham filing does not count.”<sup>14</sup> Skybridge further asserts that “[e]ven attorneys may or in some cases must disclose client confidential information, pursuant to the ‘crime-fraud’ exception’ for the same basic reason: certain information of an illegal nature does not vest rights in the holder or provider.”<sup>15</sup> Moreover, Skybridge contends that “no harm can be caused to MC/LM . . . by release of said

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<sup>8</sup> 5 U.S.C. § 552(b)(4).

<sup>9</sup> See 089 Decision at 3-5.

<sup>10</sup> See *id.* at 3-4, relying on *Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12729-31 ¶¶ 6-8 (2004) (disclosure of carrier-specific USF contribution data is likely to cause substantial competitive harm). The competitive harm standard is set forth in *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>11</sup> WCB also found that the disclosure of this information might subject the account owner to fraud and theft. See 089 Decision at 4.

<sup>12</sup> See 089 Decision at 4-5.

<sup>13</sup> Skybridge describes at length the nature of the alleged fraud, which involve alleged misrepresentations of the nature and location of MC/LM’s operations. Skybridge asserts that these misrepresentations raise questions about MC/LM’s fitness to remain a licensee. See 089 AFR at 6-9.

<sup>14</sup> See *id.* at 6.

<sup>15</sup> See *id.* at 7.

information . . . except to expose the sham which is not ‘harm’ to [its] competitive position, since that term obviously means lawful competitive position.”<sup>16</sup>

5. **Discussion.** Skybridge cites no authority directly supporting the proposition that Exemption 4 does not protect allegedly fraudulent documents. Rather, Skybridge attempts to draw an analogy with situations in which, under certain circumstances, illegal or fraudulent material is found to be outside the scope of particular policies unrelated to the FOIA. The precedent cited by Skybridge provides no support for Skybridge’s proposed Exemption 4 analysis because the policies involved are readily distinguishable from those underlying Exemption 4.

6. The “*Noerr-Pennington*” doctrine, as discussed by *City of Columbia v. Omni Outdoor Advertising, Inc.*,<sup>17</sup> (cited by Skybridge) exempts from the scope of the Sherman Antitrust Act campaigns by private individuals seeking anticompetitive action from the government. The doctrine rests on the rationale that the fundamental right to petition the government supersedes the statutory ban on concerted anticompetitive conduct. The “sham exception” noted by Skybridge declines to extend the *Noerr-Pennington* doctrine to campaigns ostensibly seeking to influence governmental action that are actually nothing more than an attempt to interfere directly with the business relationships of a competitor.<sup>18</sup> The sham exception noted by Skybridge is grounded in the balance between the government’s right to regulate anticompetitive conduct and the individual’s right to petition the government. As the Supreme Court’s rationale makes clear, this balance is different depending on whether the petition is genuine or sham. These policies, however, are totally unrelated to the policies underlying Exemption 4 and provide no guidance to our analysis of the question before us.

7. A somewhat closer analogy raised by Skybridge is the “crime-fraud” exception to the attorney-client privilege. Under the crime-fraud exception, communications between an attorney and client are not privileged if they are made in furtherance of the commission of a crime or fraud. The rationale for the exception is that the attorney-client privilege is intended to foster the beneficial effect of encouraging clients to consult freely with their attorneys; it is not intended to facilitate the commission of crime by shielding such actions from scrutiny.<sup>19</sup>

8. Unlike the attorney-client privilege, FOIA Exemption 4 does not have the effect of shielding alleged misconduct from the officials with jurisdiction for investigating it. Whether or not Exemption 4 is applied to the materials requested here, these materials are freely available to both USAC and the FCC for investigation, if appropriate. Moreover, in this case we have nothing more than Skybridge’s unsubstantiated allegations of fraud, and, even where it applies, the crime-fraud exception pierces the attorney-client privilege only where a *prima facie* showing has been

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<sup>16</sup> See *id.* at 8.

<sup>17</sup> 499 U.S. 365, 379-80 (1991); see also *Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>18</sup> See *id.*

<sup>19</sup> See, e.g., *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3rd Cir. 2000); *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 75-76 (1st Cir. 1999); *U.S. v. Lenz*, 419 F. Supp.2d 820, 830 (E.D. Va. 2005); *Stirum v. Whalen*, 811 F. Supp. 78, 80-81 (N.D.N.Y. 1993).

made of crime or fraud.<sup>20</sup> Thus the rationale of the crime-fraud exception is not immediately applicable to Exemption 4 and we turn to more germane authority.

9. The issue here is whether the allegedly fraudulent character of materials requested under the FOIA places this material outside of the rationale for withholding them under Exemption 4. The applicable basis for withholding the material submitted to USAC by MC/LM is that Exemption 4 “. . . protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.”<sup>21</sup> As noted previously, Skybridge does not challenge WCB’s determination that disclosure of the material at issue here would likely cause substantial competitive harm to MC/LM.

10. Our analysis of whether there is a countervailing interest in public disclosure of the material under the FOIA is guided by the Supreme Court’s reasoning in *U.S. Dep’t of Justice v. Reporters Committee for Freedom of the Press*.<sup>22</sup> That case involved a FOIA request for the FBI “rap sheet” of a businessman with suspected organized crime ties.<sup>23</sup> The Court held that whether disclosure of a private document was warranted under Exemption 7(C)<sup>24</sup> turned on the nature of the requested document and its relation to the basic purpose of the FOIA to open agency action to the light of public scrutiny.<sup>25</sup> That is, the Court balanced the public interest in disclosure against the privacy interest Congress intended Exemption 7(C) to protect.<sup>26</sup>

11. In carrying out this balancing, the Court rejected arguments that there was a public interest in disclosure of the rap sheets because it would illuminate the individual’s allegedly corrupt dealings with a corrupt Congressman and because the individual was an officer in a company with defense contracts. The Court found that records of the individual’s arrest and conviction of certain crimes did not say anything directly about the Congressman’s behavior or the behavior of the Defense Department. While the court found that there was some public interest in allowing the public to know the individual’s criminal history, whether it was for the purpose of writing a news story or deciding whether to extend credit to the individual, this public interest was outside the ambit of the public interest that the FOIA was intended to serve.<sup>27</sup>

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<sup>20</sup> See *In re Grand Jury Subpoena*, 223 F.3d at 217. A *prima facie* showing requires the presentation of evidence which, if believed, would be sufficient to support a finding that the elements of the crime-fraud exception were met. *See id.*

<sup>21</sup> See *National Parks*, 498 F.2d at 768.

<sup>22</sup> 489 U.S. 749 (1989) (*Reporters Committee*).

<sup>23</sup> *See id.* at 757.

<sup>24</sup> See 5 U.S.C. § 552(b)(7)(C), which applies to records compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy.

<sup>25</sup> *See Reporters Committee*, 489 U.S. at 772.

<sup>26</sup> *See id.* at 776.

<sup>27</sup> *See id.* at 774-75.

12. The Court concluded: “Accordingly, we hold as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, and then when the request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is ‘unwarranted.’”<sup>28</sup>

13. Although the policy interest behind Exemption 4 is not identical to the privacy interest protected by Exemption 7(C), we believe that in balancing the Exemption 4 or Exemption 7(C) confidentiality interest and the public interest in disclosure, the Exemption 4 interest is at least as strong as the Exemption 7 interest, because Exemption 4 vindicates a separate statutory interest under the Trade Secrets Act.<sup>29</sup> The Trade Secrets Act specifies criminal penalties for the unauthorized disclosure of confidential information by government officers or employees and is at least co-extensive in scope with Exemption 4.<sup>30</sup> The Act thus effectively prohibits the disclosure of material covered by Exemption 4.<sup>31</sup> That said, in both cases, the deciding factor is that the core purpose of the FOIA is to illuminate the operations and activities of the government and not that of private entities, whose records happen to be in government custody. Thus, under the FOIA there is no strong interest in the public disclosure of confidential records alleged to be fraudulent to outweigh the interest of confidentiality that the exemption is intended to protect.<sup>32</sup> Accordingly, we find that the allegedly fraudulent nature of the records at issue here does not place them outside the scope of Exemption 4 and that there is no justification to adopt a “fraud exception” to Exemption 4, as Skybridge suggests.<sup>33</sup> Moreover, as noted above, what we have here are allegations of fraud, not adjudicated fraudulent behavior. We believe that creating an

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<sup>28</sup> See *id.* at 780.

<sup>29</sup> 18 U.S.C. § 1905.

<sup>30</sup> See *id.* See also *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987).

<sup>31</sup> See *id.*

<sup>32</sup> Although not directly in point, it is of some relevance that the D.C. Circuit, upheld a decision in *Trans-Pacific Policing Agreement v. U.S. Customs Service*,<sup>32</sup> which applied Exemption 4 to withhold Harmonized Tariff Numbers (HTS) maintained by the United States Customs Service from a requester, which maintained that disclosure would facilitate the investigation of the fraudulent mischaracterization of shipments by exporters. The requester, Trans-Pacific Policing Agreement (TPPA), was an association of registered ocean common carriers authorized by federal statute to police exporters sending shipments into the United States. The court upheld the withholding of the HTS numbers under Exemption 4, because their disclosure would cause substantial competitive harm to the importers who submitted them to the Customs Service. The confidentiality interests of importers therefore outweighed the public interest in policing possible fraud by exporters.

<sup>33</sup> We also note another instance in which a privacy or confidentiality interest outweighed an interest in the disclosure of possible fraud, although in a different context. *Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787, 795 (7th Cir. 2009), involved a qui tam action in which the plaintiff alleged that the defendant committed fraud in its student loan debt collection practices. The trial court dismissed the case with prejudice after the plaintiff’s attorney posted on the Internet an allegedly fraudulent document subject to an “eyes only” agreement between the parties entered into preliminary to issuance of a protective order.

exception to Exemption 4 whenever fraud is alleged would allow a FOIA requester to evade the interests Exemption 4 was designed to protect. We therefore deny Skybridge's AFR.<sup>34</sup>

### III. FOIA 2009-136

#### A. BACKGROUND

14. Skybridge requested the following classes of documents concerning PSI:<sup>35</sup>

- a. copies of all Forms 499-A and 499-Q, including attachments and accompanying documents, filed for the years 1994 to the present;
- b. copies of any equivalent forms for years in which no Form 499-A or 499-Q was filed;
- c. any other records filed by PSI with USAC; and
- d. written confirmation of the filing of each Form 499-A and 499-Q.

15. In its response, WCB held that eight pages of documents should be released but other documents should be withheld under Exemption 4. WCB's rationale for withholding the Forms 499-A and 499-Q were the same as in FOIA 2009-089 and are discussed above.<sup>36</sup> Additionally, WCB provided information in its response describing PSI's filing history.<sup>37</sup>

#### B. APPLICATIONS FOR REVIEW AND DISCUSSION

16. **Skybridge Application for Review and discussion.** In its AFR, Skybridge makes essentially the same arguments it makes in its AFR with respect to FOIA No. 2009-089. That is, Skybridge does not question WCB's determination of competitive harm but rather asserts that PSI's filings are fraudulent, and that Exemption 4 does not protect the confidentiality of fraudulent documents.<sup>38</sup> For the reasons discussed in paragraphs 5-14 above, we again reject

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<sup>34</sup> We briefly address two additional arguments raised in the AFR. Skybridge requests a 45-day extension of time in which to file an AFR. *See* AFR at 1-3. Skybridge has failed to demonstrate how its already-filed AFR does not adequately present Skybridge's arguments on appeal, and we see no need for a further pleading from Skybridge. Skybridge also suggests that WCB should provide certain information about MC/LM to the Commission's Wireless Telecommunications Bureau (WTB) for their consideration. *See id.* at 3. This suggestion is irrelevant to the appeal of WCB's FOIA decision and will not be further considered.

As to the 19 pages of documents that WCB indicated should be released, Skybridge argues in its AFR that redacted copies of these documents should immediately be released to Skybridge or at least be more specifically described. *See* 089 AFR at 4-6; 089 Supplement. Skybridge asserts that WCB had no basis for ruling (089 Decision at n.2) that these documents would be withheld pending resolution of any appeals. Because MC/LM did not appeal WCB's Decision, WCB has since released the 19 pages of documents to Skybridge. *See* Letter from Jeremy D. Marcus to Mr. Jimmy Stobaugh (Dec. 3, 2009). This aspect of the matter is therefore moot.

<sup>35</sup> *See* 136 Request at 1.

<sup>36</sup> *See* para. 3, *supra*; 136 Decision at 1-4.

<sup>37</sup> *See* 136 Decision at 4-5.

<sup>38</sup> *See* 136 AFR at 5-10.

Skybridge's argument. We find that WCB properly treated PSI's filings -- other than the eight pages WCB ordered disclosed -- as confidential and exempt from disclosure.<sup>39</sup>

**17. PSI Application for Review.** PSI objects to WCB's decision to release eight pages of attachments to PSI's Form 499s.<sup>40</sup> PSI asserts that the entire Form 499 package, including all attachments, should be treated as confidential. In PSI's view, the Commission is not justified in "picking and choosing" which material associated with a Form 499 filing should be withheld because parties who file Form 499s rely on the assurance that the material they submit will be treated as confidential.<sup>41</sup> Further, PSI asserts that no portions of a Form 499 filing can be segregated as non-exempt, because the material in a Form 499 filing discloses how a company conducts its financial transactions and is thus competitively sensitive. Skybridge responds that the Commission should disclose all of the material because it is fraudulent.<sup>42</sup>

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<sup>39</sup> For the reasons discussed in note 34, *supra*, we reject Skybridge's assertion that it should be granted a 45-day extension of time to file an AFR and that WCB should provide certain information about PSI to WTB. *See* 136 AFR at 1-2.

Additionally, Skybridge again argues that the documents that WCB held should be disclosed should be released immediately and not withheld pending appeal. *See id.* at 3-4. Our rules provide that material claimed to be confidential "will be accorded confidential treatment . . . until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted." *See* 47 C.F.R. § 0.459(d)(3). This rule is necessary because releasing documents prior to the resolution of an application for review would effectively moot the AFR. Because, as discussed below, PSI submitted an appeal arguing that all documents associated with its Form 499 filings are confidential, it would not be appropriate for us to release any of the documents until this issue has been resolved. (MC/LM by contrast did not file an appeal.)

Further, we reject Skybridge's assertion that it should be provided with a detailed list of these documents. It is well established that a "Vaughn Index" (*see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)) is not required at the administrative level, and we do not customarily prepare one. *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. An agency need only provide "a sufficiently detailed description of what it is refusing to produce and why so that the requester and the court can have a fair idea what the agency is refusing to produce and why." *See 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). This may be accomplished without a detailed index of the records.

<sup>40</sup> *See* PSI AFR at 2-4. PSI also objects to the fact that WCB included information about PSI's filing history in WCB's response to Skybridge. *See id.* at 4-5. Because PSI sought confidential treatment for all of the information that Skybridge requested, WCB should have withheld information about PSI's filing history pending appeal. We direct WCB to be more careful in the future.

<sup>41</sup> PSI draws an analogy to 26 U.S.C. § 6103, which prohibits the disclosure of any information contained in an income tax return. *See* PSI AFR at 4. As described below, we are governed by the different statutory approach taken by the FOIA, which contains no such blanket prohibition and indeed requires that segregable materials be released. *See* note 43, *infra*.

<sup>42</sup> *See* Final Opposition at 2. The pleadings contain a heated dispute between Skybridge and PSI over the timeliness of Skybridge's oppositions. Skybridge's opposition was due September 22, 2009, ten business days after the filing of PSI's AFR. *See* 5 C.F.R. § 0.461(i)(1). Skybridge filed its Initial Opposition on September 30, 2009 and its Final Opposition on October 9. According to Skybridge, it did not receive a copy of PSI's AFR until September 25, although the envelope in which it was received was postmarked September 8, the day it was filed. *See* Initial Opposition at 2-3. Skybridge speculates that PSI had the envelope postmarked and then deliberately withheld it from Skybridge. Skybridge contends that PSI's (continued...)

18. **Discussion.** The Commission has a duty under the FOIA to release non-exempt material that reasonably can be segregated from exempt material.<sup>43</sup> We have examined the eight pages of documents that WCB has proposed to release. We find that it is not competitively sensitive and may be released with certain personal information redacted.<sup>44</sup>

19. The material consists of (1) several copies of a USAC “Alternative Billing Arrangements Form,” (2) a copy of an e-mail from USAC to a PSI official concerning the filing of the 2006 Form 499-A, and (3) a cover letter signed by a PSI official to USAC regarding the filing of the 2008 Form 499-A and the envelope in which the cover letter was mailed. All of these documents reflect purely administrative matters associated with the filing of the Form 499s and do not reflect any information having to do with PSI’s business or financial affairs. We do not see how the disclosure of any of this material could have an impact on PSI’s competitive position and thus do not see any basis for applying Exemption 4.

20. We have also considered PSI’s contention that information regarding individuals contained in the documents should be withheld under FOIA Exemption 6<sup>45</sup> because disclosure would constitute a clearly unwarranted invasion of personal privacy.<sup>46</sup> The Alternative Billing Arrangements Form contains the name, telephone number, fax number, and address of PSI’s contact person. The name, telephone number, and address listed on the Alternative Billing Arrangements Form are publicly available on the FCC Form 499-A Telecommunications Reporting Worksheet, which may be accessed on the Commission’s website. We will release this information.<sup>47</sup> We will redact the fax number to avoid subjecting the contact person to unwanted

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AFR should be dismissed. PSI responds that Skybridge’s allegations are “unsubstantiated” and “scurrilous” and that the Initial Opposition should be stricken. *See* PSI Opposition at 3. Because we find meritless Skybridge’s arguments concerning the relevance of alleged fraud to the Exemption 4 analysis, which Skybridge also makes in other pleadings, we need not decide whether Skybridge’s opposition is timely or not.

<sup>43</sup> *See EPA v. Mink*, 410 U.S. 73, 91 (1973) (government must disclose nonexempt material that is severable from exempt material in the same document and which can be disclosed without compromising the exempt material).

<sup>44</sup> As PSI notes (PSI AFR at 5), 47 C.F.R. §0.457(d)(2) provides that “If it is shown in the [confidentiality] request that the materials contain trade secrets or privileged or confidential commercial, financial or technical data, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under §0.461.” Here, however, we find that the material we will disclose is not privileged or confidential. Under the FOIA, an agency must disclose nonexempt material upon request. *See* 5 U.S.C. § 552(a)(3)(A).

<sup>45</sup> Exemption 6, 5 U.S.C. § 552(b)(6), “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

<sup>46</sup> *See* PSI AFR at 5.

<sup>47</sup> *See Joel Harding*, 23 FCC Rcd 4214, 4217 ¶ 8 (2008) (licensee had no privacy interest in home address publicly available through Commission’s website). Information that is freely available to the public is not private. *See Reporters Committee*, 489 U.S. at 763-64.

faxes.<sup>48</sup> The e-mail contains the partial name of a PSI employee and that person's e-mail address. PSI voluntarily disclosed the name of the employee responsible for Form 499-A filings in a declaration attached to its AFR, which was served on Skybridge without any provision for maintaining privacy. Accordingly, we see no basis to treat the name as private. We will redact the e-mail address to avoid subjecting the employee to unwanted e-mails. For the same reason, we see no basis for treating as private the employee's full name, as it appears on the cover letter. It appears, however, that the return address on the envelope is the employee's home address. We will redact it to protect the employee's privacy.

#### IV. FEE ISSUES

##### A. BACKGROUND

21. In both of its FOIA requests, Skybridge indicated that it would pay a maximum fee of \$400.<sup>49</sup> Skybridge did not claim entitlement to a reduced fee or ask for a fee waiver. WCB assessed a fee of \$230.98 with respect to FOIA No. 2009-089 and a fee of \$238.89 with respect to FOIA No. 2009-136.<sup>50</sup> Skybridge indicates that it paid both fees.<sup>51</sup>

##### B. WAIVER REQUESTS AND DISCUSSION

22. **Waiver requests.** Skybridge now seeks a waiver of fees and requests that the fees already paid be refunded.<sup>52</sup> Most of each request consists of lengthy verbatim quotations from a Department of Justice document discussing fee waivers.<sup>53</sup> As to the merits of its own requests, Skybridge states:

[Skybridge] requests a fee waiver/reduction in accord with the fact and law cited above. [Skybridge] is exclusively nonprofit by law and operation. [Skybridge] does not retain but publicly discloses information obtained via its actions, including FCC FOIA actions, for public information, education and benefit, including in these cases for compliance with FCC law and to illustrate what [Skybridge] believes are improper and inadequate actions by the FCC in the matters underlying the subject FOIA requests.

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<sup>48</sup> See *Center for Public Integrity v. FCC*, 505 F. Supp.2d. 106, 113 (D.D.C. 2007) (withholding individuals' telephone numbers and e-mail addresses).

<sup>49</sup> See 089 Request at 2; 136 Request at 2.

<sup>50</sup> See 089 Decision at 5; 136 Decision at 5.

<sup>51</sup> See Waiver Requests, note 52, *infra*, attachments.

<sup>52</sup> See two identical e-mails from Warren Havens, President to Federal Communications Commission (FOIA Matters) (Sept. 18, 2009) (Waiver Requests).

<sup>53</sup> See Waiver Requests at 1-5, citing U.S. Dep't of Justice, *Freedom of Information Act Guide* (May 2004), section cited available online at <http://www.usdoj.gov/oip/fees.htm>.

[Skybridge] has a clear record before the FCC and otherwise publicly in actions as just described, including the [Skybridge] created and maintained, well-used by the public, website at [www.tetra-us.us](http://www.tetra-us.us).

....

In addition, since the FCC responded late to this request, without good cause being demonstrated, that is further good cause to reduce or eliminate the fees assessed that [Skybridge] hereby pays in protest.

**23. Discussion.** The Commission's rules provide that "[w]hen a requester believes that he or she is entitled to a . . . waiver . . . the requester must include, in his or her original FOIA request, a statement explaining with specificity, the reasons the reasons why he or she qualifies for . . . a fee waiver."<sup>54</sup> As Skybridge acknowledges, it did not ask for a fee waiver when initially filing the subject FOIA requests.<sup>55</sup> The fact that Skybridge failed to include a request for fee waiver in its initial FOIA requests, as the rule requires, is sufficient reason by itself to deny the waiver requests.

24. Even if we did reach the merits of the waiver requests, we would still deny them. We have considered and denied fee waiver requests by Skybridge in connection with earlier FOIA requests. We have found that Skybridge failed to meet the statutory standard of demonstrating 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>56</sup> We find that Skybridge has once again failed to make the required showing.

25. While Skybridge alleges that the records it seeks demonstrates malfeasance on the part of MC/LM and PSI, Skybridge fails to show with specificity how this information will contribute to public understanding of the operations or activities of the government, as opposed to those of MC/LM and PSI.<sup>57</sup> Further, individuals and commercial entities associated with Skybridge have been actively involved in prosecuting issues concerning MC/LM and PSI,<sup>58</sup> and it appears that Skybridge's FOIAs are directed to assisting these efforts.<sup>59</sup> Finally, simply

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<sup>54</sup> See 47 C.F.R. § 470(c).

<sup>55</sup> See Waiver Requests at 1.

<sup>56</sup> See 5 U.S.C. § 552(a)(4)(A)(iii); 47 C.F.R. § 0.470(e)(1); *Warren Havens*, 24 FCC Rcd 12308, 12315-16 ¶¶ 15-16 (2009).

<sup>57</sup> See *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (requiring an explanation with "reasonable specificity how disclosure will contribute to public understanding" of government operations or activities), citing *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987) (burden is on the requester to identify and demonstrate with "reasonable specificity" the public interest to be served).

<sup>58</sup> See PSI AFR at 1 (indicating that PSI is the subject of litigation by Skybridge and its affiliates); Letter from Joel Kaufman, Associate General Counsel to Skybridge Spectrum Foundation (Oct. 30, 2009) at 2 (referring to pleading filed with respect to MC/LM by Skybridge principal Havens).

<sup>59</sup> See *McClain v. U.S. Dep't of Justice*, 13 F.3d 220, 221 (7th Cir. 1993) (a former inmate's request for information concerning federal investigation and prosecution of him served to facilitate a challenge to his (continued. . . )

maintaining a website is not disseminating information to a broad audience of the interested public, as required by the statutory standard.<sup>60</sup>

26. Finally, Skybridge contends “since the FCC responded late to the subject FOIA request, without good cause being demonstrated, that is further good cause to reduce or eliminate the fees associated with the fees assessed.”<sup>61</sup> 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.<sup>62</sup> This provision, however, applies only to FOIA requests filed on or after the effective date of the amendments.<sup>63</sup> Because Skybridge’s FOIA requests predated the effective date of the amendments (December 31, 2008), the provision in question has no relevance here.<sup>64</sup>

## V. ORDERING CLAUSES

27. IT IS ORDERED that the application for review filed June 24, 2009 by Skybridge Spectrum Foundation IS DISMISSED as moot.

28. IT IS ORDERED that the applications for review, filed September 22, 2009 and September 23, 2009 by Skybridge Spectrum Foundation ARE DENIED. Skybridge may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).

29. IT IS ORDERED that Paging System, Inc.’s application for review IS GRANTED to the extent indicated above and is otherwise DENIED. If PSI 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 Skybridge as specified in WCB’s decision and as modified above. See 47 C.F.R. § 0.461(i)(4).

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conviction and therefore did not qualify as contributing significantly to the public understanding of government operations). See also *VoteHemp, Inc. v. DEA*, 237 F.Supp.2d 55, 64-65 (D.D.C. 2002) (association between non-profit organization that advocated the deregulation and free market for industrial hemp and industries that would benefit from this advocacy established that non-profit had commercial purpose); *Robert J. Robbins, Call Communications Group, Inc.*, 21 FCC Rcd 6685, 6687 ¶ 5, n.20 (2006) (rejecting fee waiver for reporter for noncommercial radio station where FOIA concerned alleged interference with that station’s signal).

<sup>60</sup> See *Brown v. USPTO*, 445 F. Supp.2d 1347, 1360 (M.D. Fla. 2006), aff’d, 226 Fed. Appx. 866 (11th Cir. 2007).

<sup>61</sup> See Waiver Requests at 5.

<sup>62</sup> See *Openness Promotes Effectiveness in Our Government Act of 2007*, Pub. L. 110-175 (Dec. 31, 2007) at § 6(b)(1)(A), codified at 5 U.S.C. § 552(a)(4)(A)(viii), implemented by 47 C.F.R. § 0.470(a).

<sup>63</sup> See *id.* at § 6(b)(2).

<sup>64</sup> In view of this finding, we do not reach the question whether good cause has been shown for any delay in WCB’s responses to Skybridge’s FOIA requests.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary