

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

In the Matter of)	
)	
SKYBRIDGE SPECTRUM FOUNDATION)	FOIA Control Nos. 2010-495, 2010-496,
)	2010-506, 2010-507, 2010-508, and 2010-
On Request for Inspection of Records)	538
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 2011

Released: September 26, 2011

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we deny an application for review filed by Skybridge Spectrum Foundation (Skybridge).¹ Skybridge seeks review of decisions by the Office of General Counsel (OGC)² denying Skybridge's requests for waiver of fees for processing the above-referenced Freedom of Information Act (FOIA) requests.

II. BACKGROUND

2. Skybridge filed the six above-referenced FOIA requests seeking a variety of records.³ In each request, Skybridge sought a waiver or reduction of fees for processing the request pursuant to the "public interest" provision of the FOIA that entitles a requester to a fee waiver "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding

¹ See Application for Review of Freedom of Information Act Action, filed September 27, 2010, by Skybridge (AFR). On September 17, 2010, Skybridge received an oral one-week extension of time, from September 20, 2010 to September 27, 2010, in which to file its AFR. See Consent Request for Extension of Time Within Which To File Application for Review of Freedom of Information Act Action, filed September 19, 2010, by Skybridge, at 2 (noting Commission's consent to an extension). Given that the application for review was timely filed in accordance with the extension granted on September 17, the later-filed "Consent Request" is moot and is therefore dismissed.

² See Letter from Ann E. Bushmiller, Deputy Associate General Counsel to Skybridge Spectrum Foundation (Aug. 19, 2010) (Consolidated Decision); Letter from Ann E. Bushmiller, Deputy Associate General Counsel to Skybridge Spectrum Foundation (Aug. 26, 2010) (Additional Decision).

³ See e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Jul. 15, 2010) (FOIA Control No. 2010-495, seeking records regarding a delay in Auction 87); e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Jul. 15, 2010) (FOIA Control No. 2010-496, seeking records related to earlier FOIA requests by Skybridge); e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Jul. 24, 2010) (FOIA Control No. 2010-506, seeking confidential filings by the TETRA Association); e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Jul. 26, 2010) (FOIA Control No. 2010-507, seeking records regarding Sandra DePriest and her husband); e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Jul. 26, 2010) (FOIA Control No. 2010-508, seeking records concerning the Telecommunications Development Fund and Spectrum Bridge); and e-mail from Skybridge Spectrum Foundation to FOIA@fcc.gov (Aug. 17, 2010) (FOIA 2010-538, seeking records regarding the relationship between FCC employees and five named individuals).

of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁴

3. Skybridge’s showing in support of each request set forth substantially the same rationale.⁵ Specifically, in each request Skybridge stated that it is a non-profit, tax-exempt scientific, educational, and charitable foundation that publishes information on FCC matters in the public interest on its websites. Skybridge complained that, in past decisions denying Skybridge’s requests for fee waivers,⁶ the Commission failed to appreciate that Skybridge’s websites effectively publish information to the public. Skybridge stated that its websites have attracted tens of thousands of visitors and generated much interest, some of it reflected in FCC proceedings and court cases. Skybridge stated that it also intends to use the information in other, non-publishing educational activities.

4. OGC denied all six fee waiver requests, finding that Skybridge failed both prongs of the “public interest” test for FOIA fee exemptions.⁷ First, OGC found that Skybridge did not demonstrate how release of the records sought would be in the public interest by “contribut[ing] significantly to public understanding of the operations or activities of the government.”⁸ Second, OGC found that Skybridge did not demonstrate that its request was primarily to serve the public interest, rather than commercial interests. In this regard, OGC found that while Skybridge itself is a non-profit entity, it was founded to undertake activities, including publicizing issues and legal defense, related to for-profit wireless businesses co-managed by Mr. Warren Havens, and that the information Skybridge requested related directly to the interests of those affiliated commercial entities.⁹

III. APPLICATION FOR REVIEW

5. In its application for review, Skybridge does not provide any argument challenging OGC’s finding that Skybridge failed to show that its FOIA requests were in the public interest. The application for review merely states that “Skybridge disputes [OGC’s] decision on this issue” and does not further address the merits of the public interest finding.¹⁰

6. Instead, Skybridge argues for the first time in this proceeding that there is an independent ground on which it qualifies for a fee waiver, which does not require a showing that the requests further the public interest.¹¹ Skybridge argues that the “public interest” test is not relevant when the requester is “an educational or noncommercial scientific institution whose purpose is scholarly or scientific research.”¹² Skybridge further claims that it is therefore entitled to a fee waiver because it is a non-profit,

⁴ 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 47 C.F.R. § 0.470(e)(1) (setting forth the same criteria for granting a fee waiver).

⁵ *See* Consolidated Decision at 2-5; Additional Decision at 2.

⁶ The Commission affirmed OGC’s denial of fee waivers with respect to FOIA Nos. 2007-382, 2007-403, 2009-089, and 2009-136. *See Warren Havens*, Memorandum Opinion and Order, 24 FCC Rcd 12308 (2009); *Skybridge Spectrum Foundation*, Memorandum Opinion and Order, FCC 10-135 (rel. Aug. 3, 2010), *reported at* 15 Comm. Reg. (P&F) 12 (2010).

⁷ *See* Consolidated Decision at 2-5; Additional Decision at 2-3.

⁸ *See supra* note 4; Consolidated Decision at 1-5; Additional Decision at 2.

⁹ In this regard, OGC relied in part on an earlier Commission determination regarding Skybridge’s affiliation with other entities managed by Mr. Havens. *See Warren Havens*, 24 FCC Rcd at 12315-16, paras. 15-16.

¹⁰ *See* AFR at 10.

¹¹ *See id.* at 11-13.

¹² *See* AFR at 11; 5 U.S.C. § 552(a)(4)(A)(ii)(II).

tax-exempt scientific, educational, and charitable foundation; is recognized by the Internal Revenue Service (IRS) as tax-exempt; and maintains a web page on which it publishes a wide variety of information on FCC issues.¹³

7. Skybridge disputes OGC's finding that its requests serve commercial interests. Skybridge contends that it does not engage in commercial activities, that other agencies have granted it fee waivers, and that OGC placed an unfair burden on Skybridge by requiring it to prove a negative, namely, that its interest in the information was not commercial.¹⁴ In particular, Skybridge asserts that OGC had no basis to find that its requests are commercial on the basis that Skybridge is co-managed with for-profit entities that may benefit from the information requested.¹⁵

8. As a related matter, Skybridge asserts that pursuant to section 0.470(d) of the Commission's rules,¹⁶ OGC was required to give Skybridge an opportunity to submit further information to demonstrate the non-commercial status of its request before finding that Skybridge had a commercial interest.¹⁷ That section provides that:

If the Commission reasonably believes that a commercial interest exists, based on the information provided pursuant to paragraph (c) of this section, the requester shall be so notified and given an additional ten business days to provide further information to justify receiving a reduced fee. See § 0.467(e)(2). During this time period, the materials will be available for inspection to the extent that the time period exceeds the time period for responding to FOIA requests, as appropriate.

9. Finally, Skybridge contends that the Commission is barred in any event from charging any fee for processing Skybridge's FOIA request. Skybridge argues that OGC had no basis to toll the deadline for responding to Skybridge's FOIA request while the fee waiver request was pending, and, as a result, the FOIA prevents the Commission from charging any fee.¹⁸

IV. DISCUSSION

10. **Standard for entitlement to a fee waiver.** We deny Skybridge's application for review. An applicant for a fee waiver must meet both prongs of the statutory waiver standard to be entitled to a waiver. OGC previously determined that Skybridge's request did not meet either prong: Skybridge did not demonstrate that release of the records "was in the public interest because it would likely contribute to public understanding of the operations or activities of the government," nor did it demonstrate that the request was "not primarily in the commercial interest of the requester."¹⁹ We affirm OGC's decision that Skybridge did not make a showing sufficient to satisfy either prong.

¹³ See *id.* at 9-10.

¹⁴ See *id.* at 12-13.

¹⁵ See *id.* at 13-15. Skybridge states, however, "that when documents responsive to the FOIA Requests are actually obtained . . . the information therein may be used beneficially by other for-profit FCC licensees." See *id.* at 15-16.

¹⁶ 47 C.F.R. § 0.470(d).

¹⁷ See AFR at 7-9.

¹⁸ See *id.* at 8-9. The language of 5 U.S.C. § 552(a)(4)(A)(viii) provides (subject to exceptions not relevant here): "An agency shall not assess search fees . . . under this subparagraph if the agency fails to comply with any time limit under paragraph (6)." See also 47 C.F.R. § 0.470(a)(1)(ii) ("Commercial use requesters shall not be assessed search fees if the Commission fails to comply with the time limits under § 0.461(g)(1) . . .").

¹⁹ See 5 U.S.C. § 552(a)(4)(A)(iii): "Documents shall be furnished without any charge or at a charge reduced below the fees established . . . if disclosure of the information is in the public interest because it is likely to contribute

(continued....)

11. First, we affirm OGC's decision that Skybridge failed to demonstrate that release of the records was in the public interest because it would likely contribute to public understanding of the operations or activities of the government. Skybridge's application for review on this point provides no data or arguments to explain why OGC's conclusion was in error. Rather, "Skybridge disputes [OGC's] decision on this issue."²⁰ The Commission's rules require that an application for review "shall specify with particularity, from among the following [five factors listed], the factor(s) which warrant Commission consideration of the questions presented."²¹ Skybridge did not even identify one of the factors, much less attempt to "specify with particularity" why the Commission should revisit OGC's determination. For this reason, we affirm OGC's decision on the first prong.²²

12. As a second and independent ground for our decision, we also reject Skybridge's challenge to OGC's conclusion with respect to the second prong of the statutory fee waiver standard, that its request was not primarily in its commercial interest.²³ OGC did not "second guess" Skybridge's treatment as a non-profit, tax-exempt entity by the IRS or the State of Delaware. As we have held previously with respect to Skybridge, its status as a non-profit entity does not relieve it of the obligation to meet the fee waiver criteria set forth in the FOIA and the Commission's rules.²⁴ Skybridge's tax status is irrelevant to this question. OGC found that the information request serves the interests of Skybridge's affiliated for-profit entities.²⁵ Under the prevailing case law, the interests of affiliated entities are relevant to determining "the commercial interest of the requester" in applying the fee waiver standard.

13. This conclusion is consistent with the court's interpretation of the statutory standard in *VoteHemp, Inc. v. DEA*.²⁶ VoteHemp was a non-profit corporation that advocated the use of industrial hemp by means of a website, press advisories, and e-mail. Despite VoteHemp's status as a non-profit corporation and its ostensible purpose of educating the public, the court held that VoteHemp's request for records concerning DEA's hemp policy served commercial interests. The court found that VoteHemp was in "association with businesses with a commercial interest in hemp products," which would directly benefit from the positions advocated by VoteHemp.²⁷ The court thus rejected the position Skybridge advocates that the requester's non-profit status is determinative of whether it has a "commercial interest"

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significantly to public understanding of the operations or activities of the government *and* is not primarily in the commercial interest of the requester." (Emphasis added.) *See also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (requiring requester to satisfy all criteria to qualify for a fee waiver).

²⁰ AFR at 10.

²¹ 47 C.F.R. § 1.115(b)(2).

²² Because a party must satisfy both prongs of the "public interest" test to justify a fee waiver, we could deny Skybridge's AFR for this reason alone.

²³ *See* 47 C.F.R. § 0.470(e)(3) (setting forth the criteria for determining whether a request is primarily in the commercial interest of the requester).

²⁴ *See Warren Havens*, 24 FCC Rcd at 12316, para. 16.

²⁵ Skybridge does not dispute this finding. *See supra* note 15.

²⁶ 237 F.Supp.2d 55, 65-66 (D.D.C. 2002). Skybridge takes issue (*see* AFR at 14) with OGC's reliance on *McClain v. U.S. Dep't of Justice*, 13 F.3d 220, 221 (7th Cir. 1993), and *Robert J. Robbins Call Commc'ns Group, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 6685, 6687, para. 5 n.20 (2006), for the proposition that FOIA requests that serve a private rather than public interest are not entitled to a fee waiver. *See* Consolidated Decision at 2 n.12; Additional Decision at 3 n.13. We disagree. These cases further support the analysis discussed herein.

²⁷ *See Vote Hemp*, 227 F.Supp.2d at 65. For example, VoteHemp's website contained direct links to industry websites and solicited money to support the industry's legal efforts. *See id.* As noted, Skybridge was established to undertake activities, including publicizing issues and legal defense, related to the commercial wireless businesses co-managed by Warren Havens. *See supra* paragraph 4.

within the meaning of the statute, where the FOIA request furthers commercial interests with which the requester is associated. This precedent confirms that Skybridge is a commercial requester and not eligible for a fee waiver.

14. We also reject Skybridge's contention that OGC's decision must be reversed because Skybridge was denied a full opportunity to demonstrate the non-commercial character of its requests. We find that even if rule 0.470(d) required OGC to give Skybridge an opportunity to submit further information regarding commercial interests, OGC's failure to do so was at most harmless error.²⁸ Now that Skybridge has had the opportunity to identify such additional information in its AFR, it has not done so. Skybridge's AFR does not contain any additional relevant information to support its claim, nor does it refer to any additional information that it would have submitted. We thus affirm that Skybridge has failed to show that its request was not in its commercial interest. Moreover, the commercial interest issue is not dispositive given the finding above that Skybridge failed to satisfy the first prong of the public interest test.

15. **Standard for classification as an Educational or Scientific Institution.** Skybridge asserts that there is an independent ground for granting a fee waiver, one that does not require the public interest showing.²⁹ Skybridge now claims it should be classified for the purpose of assessing fees as "an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research."³⁰ If it were classified as an educational or noncommercial scientific requester, Skybridge would be entitled to the *reduced* fees applicable to that category of requesters, not the fee waiver it has sought.³¹ In any event, Skybridge's argument overlooks the eligibility requirement for a reduced fee: under the FOIA, an educational or non-commercial scientific institution must conduct "scholarly or scientific research."³² While Skybridge indicates that its purpose is to disseminate information about FCC matters, it gives no indication that it conducts scholarly or scientific research. Skybridge is therefore not eligible to be classified as an educational or non-commercial scientific institution.³³ Further, an educational institution must be a preschool, elementary or secondary school, and institution of undergraduate or graduate education or a professional or vocational school.³⁴ Skybridge does not meet these criteria. An entity whose purpose is to further a specific product or industry, as Skybridge furthers the Warren Havens-related wireless businesses, is not entitled to reduced fees as a noncommercial scientific institution.³⁵

²⁸ Under 47 C.F.R. § 1.115(b)(2)(v), an application for review that rests on alleged procedural error must show prejudice.

²⁹ See AFR at 10-11. Although Skybridge describes its independent ground as an alternative basis for a fee waiver, it actually refers to a different FOIA provision from that relating to fee waivers.

³⁰ See 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media"); AFR at 11.

³¹ Educational and scientific requesters are not charged search or review fees or duplication fees for the first 100 pages. See 5 U.S.C. § 552(a)(4)(A)(ii)(II); 47 C.F.R. § 0.470(a)(2)(i).

³² See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

³³ We are not persuaded by Skybridge's contention (see AFR at 12) that other federal agencies have granted fee waivers to Skybridge based on its status as an educational or scientific institution. The facts before us do not warrant a reduction of fees.

³⁴ See *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 Fed. Reg. 10012, 10014 (Mar. 27, 1987) (Fee Guidelines); *Nat'l Security Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989); 47 C.F.R. § 0.466(a)(5).

³⁵ See Fee Guidelines, 52 Fed. Reg. at 10014.

16. **Tolling response deadline.** Finally, we reject Skybridge's assertion that OGC had no authority to find that the time for responding to Skybridge's FOIA request is tolled during the resolution of fee issues.³⁶ Both the FOIA and the Commission's rules clearly provide that the time for responding to a FOIA request may be tolled for the clarification of fee issues.³⁷ Fee issues are the very subject of Skybridge's AFR. Consequently, there is no merit to Skybridge's claim that the Commission missed the deadline for responding to Skybridge's FOIA request and is therefore is barred from charging Skybridge processing fees.

V. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED that the Consent Request for Extension of Time Within Which To File Application for Review of Freedom of Information Act Action, filed by Skybridge Spectrum Foundation, IS DISMISSED as moot.

18. IT IS FURTHER ORDERED that the application for review by Skybridge Spectrum Foundation IS DENIED. Skybridge may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁶ See Consolidated Decision at 5; Additional Decision at 3.

³⁷ See 5 U.S.C. § 552(a)(6)(A)(ii)(II) (due date may be tolled if necessary to clarify issues regarding fee assessment); 47 C.F.R. §§ 0.461(e)(2)(B)(1)-(2) (due date will be tolled until clarification of fee assessment issues).