

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

In the Matter of	)	
	)	
SKYBRIDGE SPECTRUM FOUNDATION	)	FOIA Control Nos. 2011-241 and 2011-242
	)	
On Request for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 13, 2011**

**Released: October 14, 2011**

By the Commission:

**I. INTRODUCTION**

1. By this memorandum opinion and order, we grant in part and otherwise deny the application for review of Skybridge Spectrum Foundation (Skybridge),<sup>1</sup> seeking review of responses by the Wireless Telecommunications Bureau (WTB) to two Freedom of Information Act (FOIA) requests by Skybridge.<sup>2</sup> We find that WTB correctly classified Skybridge as a commercial requester. We modify WTB's responses in certain respects.

**II. BACKGROUND**

2. **FOIA 2011-241.** In this FOIA request, Skybridge seeks "records, documents, communications (including, but not limited to, internal FCC staff communications and also FCC staff communications with third parties, including, but not limited to, Amtrak and any representatives on Amtrak's behalf or in support of Amtrak's request for waiver) and any other information that the FCC has in its possession or control . . . that led to or pertain to: FCC Public Notice, DA 11-322, Released February 18, 2011."<sup>3</sup> The public notice seeks comment on a request by Amtrak for a waiver of certain Part 80 rules to permit use of the 217-218 MHz and 219-220 MHz bands for "positive train control" systems.<sup>4</sup>

<sup>1</sup> See Review of Freedom of Information Act Action, filed May 6, 2011 (AFR).

<sup>2</sup> See e-mail from Mark Griffith to [FOIA@fcc.gov](mailto:FOIA@fcc.gov) (Mar. 9, 2011) (because this relates to FOIA No. 2011-241, we will refer to this as the "241 Request") see also Letter from Roger Noel, Chief, Mobility Division to Warren Havens, President (Apr. 6, 2011) (for the same reason, the "241 Decision").

<sup>3</sup> See 241 Request at 1-2.

<sup>4</sup> See *Wireless Telecommunications Bureau Seeks Comment on National Railroad Passenger Corporation (Amtrak) Request for Waiver of Certain Part 80 Automated Maritime Telecommunications System (AMTS) Rules to Implement Positive Train Control (PTC)*, Public Notice, DA 11-322 (WTB Feb. 18, 2011).

3. In response, WTB released 41 pages of documents but withheld staff notes and analyses and internal staff e-mails pursuant to the deliberative process privilege of FOIA Exemption 5.<sup>5</sup> For purposes of assessing fees for processing the request, WTB classified Skybridge as a commercial requester<sup>6</sup> and assessed a fee of \$205.73.<sup>7</sup> WTB rejected Skybridge's claim that it was entitled to a waiver or reduction of fees as an educational or non-commercial scientific institution.<sup>8</sup>

4. **FOIA 2011-242.** This FOIA request contains two distinct sets of requests. In the first,<sup>9</sup> Skybridge seeks "all records, documents, information, and communications" that pertain to (1) a formal complaint, *Franya Marzec v. Randy Power*, File No. WTB/ENF-98-0002;<sup>10</sup> (2) a licensing proceeding involving Marzec and Procomm, a company affiliated with Power;<sup>11</sup> (3) two letters cited in the *Procomm* order;<sup>12</sup> and (4) any other formal complaints involving Randy and Patricia Power and two related businesses, Radiolink Corporation and Procomm. In the second set of requests, Skybridge seeks "all records, documents, communications (including, but not limited to, informal and formal FCC staff communications with the below-noted parties) and any other information" that pertains to (1) Randy Power, (2) Patricia Power, (3) Radiolink Corporation, and (4) Procomm.<sup>13</sup>

5. WTB responded that it located no records responsive to this FOIA request.<sup>14</sup> WTB again classified Skybridge as a commercial requester, rejecting Skybridge's claim to be a non-commercial educational or scientific institution entitled to a waiver or reduction of fees, and assessed a search and review fee of \$161.63.<sup>15</sup>

6. **Application for review.** Skybridge argues, with respect to both FOIA requests, that WTB erred in classifying it as a commercial requester that was not entitled to a reduced fee or a waiver of fees.<sup>16</sup> Skybridge accuses WTB of relying on past determinations that Skybridge was a commercial requester and ignoring the showing made in Skybridge's FOIA requests.<sup>17</sup> Skybridge asserts that it is "the only nonprofit educational (and scientific and charitable) nonprofit tax-exempt organization in the nation with large amounts (nationwide or in major regions of the nation) of FCC licensed spectrum dedicated to public-agency and high public interest wireless, and that publishes extensive materials on

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<sup>5</sup> See 241 Decision at 1-3; see also 5 U.S.C. § 552(b)(5) (exempting from disclosure "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").

<sup>6</sup> See 47 C.F.R. §§ 0.466(a)(4), 0.470(a)(1).

<sup>7</sup> See 241 Decision at 3.

<sup>8</sup> See *id.* at 3 n.14.

<sup>9</sup> See e-mail from Skybridge Spectrum Foundation to [FOIA@fcc.gov](mailto:FOIA@fcc.gov) (Mar. 10, 2011) (the "242 Request") at 1-2; see also Letter from Roger Noel, Chief, Mobility Division to Warren Havens, President (Apr. 6, 2011) (for the same reason, the "242 Decision").

<sup>10</sup> See *Marzec v. Power*, Order, 15 FCC Rcd 4475 (EB 2000).

<sup>11</sup> See *Procomm*, Memorandum Opinion and Order, 16 FCC Rcd 19478 (EB 2001).

<sup>12</sup> These are described as a letter from Stephen Tsuya, Engineer in Charge, to Randy Power (Oct. 25, 1993) and a letter from Terry L. Fishel, Chief, Land Mobile Branch to Randy Power (Feb. 7, 1994).

<sup>13</sup> See 242 Request at 2-3.

<sup>14</sup> See 242 Decision at 1.

<sup>15</sup> See *id.* at 1-2.

<sup>16</sup> See AFR at 1-3.

<sup>17</sup> See *id.* at 1-2.

advanced wireless to achieve these goals, and legal actions to protect said spectrum and said goals.”<sup>18</sup> Skybridge additionally notes that it publishes material on the website scribd.com, and donates money for public agency research on advanced wireless.<sup>19</sup>

7. With respect to FOIA No. 2011-241, Skybridge argues that WTB charged it an excessive fee.<sup>20</sup> Skybridge notes that it did not request documents that are available online.<sup>21</sup> According to Skybridge, of the 41 pages that WTB released, 34 are available online. Skybridge contends that the search and copying fees should not have been based on the full 41 pages.

8. With respect to FOIA No. 2011-242, Skybridge states that it does not believe that WTB was unable to locate any responsive documents. Skybridge also questions whether WTB failed to inform it of materials that are available online.<sup>22</sup>

### III. DISCUSSION

9. **Skybridge’s status as a commercial requester.** As Skybridge notes, it has repeatedly claimed entitlement to reduced fees or a waiver of fees in past FOIA requests based, in part or in whole, on the claim that its requests did not serve a commercial purpose. Under the FOIA statute and our implementing regulations, “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.”<sup>23</sup> Although Skybridge’s FOIA request and AFR refer to a “waiver or reduction of fees” and appear to use these terms interchangeably in its AFR, it cites only the above provision limiting fees for eligible educational or noncommercial scientific institutions to reproduction costs and we shall accordingly deal only with that provision here.<sup>24</sup>

10. First, we examine whether Skybridge is “an education or noncommercial scientific institution.” Skybridge has not contended that it is an “educational institution,” which is defined under our regulations as “a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of professional education or an institution of vocational education, which operates a program or programs of scholarly research.”<sup>25</sup> We therefore turn to whether Skybridge is a “non-commercial scientific institution,” which is defined as “an institution that is not operated on a commercial basis as that term is referenced in paragraph (a)(4) of this section, *and* which is

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<sup>18</sup> *See id.* at 2.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at 3.

<sup>21</sup> *See* 241 Request at 1.

<sup>22</sup> *See* AFR at 3-4.

<sup>23</sup> 5 U.S.C. 552(a)(4)(A)(ii)(II); *accord* 47 C.F.R. § 0.470(a)(2). Requesters who are representatives of the news media are entitled to reduced fees under this provision “only when the request is for the purpose of distributing information.” *Id.* § 0.470(a)(2)(i).

<sup>24</sup> A fee waiver or reduction is also available “when ‘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.’” 5 U.S.C. § 552(a)(4)(A)(ii)(II); 47 C.F.R. § 0.470(e)(1)(quoting 5 U.S.C. 552(a)(A)(iii)). Skybridge does not rely on this provision. *See* AFR at 3.

<sup>25</sup> *See* 47 C.F.R. § 0.466(a)(5). We recently rejected a similar claim by Skybridge. *Skybridge Spectrum Foundation*, Memorandum Opinion and Order FCC 11-140 (rel. Sept. 26, 2011), para. 15 ( Skybridge FOIA Order) (finding that Skybridge does not meet the criteria to be classified as a education institution).

operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.”<sup>26</sup> The Commission recently found that Skybridge is not a “non-commercial scientific institution” under the Commission’s rules.<sup>27</sup> Under the first prong of the relevant definition, such an institution must be operated “*solely* for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.”<sup>28</sup> Skybridge itself points out in its AFR that it has “large amounts . . . of FCC licensed spectrum dedicated to public-agency and high public interest wireless, and . . . publishes extensive materials on advanced wireless to achieve these goals, and legal actions to protect said spectrum and said goals.”<sup>29</sup> In its own words, Skybridge promotes advanced wireless, a “particular product or industry.” On this basis alone, we find again that Skybridge does not meet the definition of a “non-commercial scientific institution” eligible for reduced fees.

11. Separately and independently, Skybridge has again failed to show that it is “not operated on a commercial basis” for purposes of satisfying the second prong of the definition of “noncommercial scientific institution.” Under the definition in rule 0.466(a)(6), a “non-commercial scientific institution” must be an “institution that is not operated on a commercial basis as that term is referenced in paragraph (a)(4).”<sup>30</sup> Paragraph (a)(4), in turn, describes a “commercial use request” as one “from or on behalf of one who seeks information for a use or purpose that furthers the commercial interests of the requester. [T]he Commission [looks at] the use to which [the] requester will put the documents.”<sup>31</sup>

12. The Commission recently considered how Skybridge’s affiliations with Havens’ commercial wireless business affect Skybridge’s claim to be noncommercial.<sup>32</sup> We held, consistent with judicial precedent interpreting the statutory standard, that Skybridge’s requests were primarily in its commercial interest, because the information requested would benefit the Havens commercial wireless businesses closely associated with Skybridge.<sup>33</sup> In particular, we concluded that the information requested would primarily serve the interests of the Havens commercial wireless businesses closely associated with Skybridge, by virtue of the fact that Skybridge was established to undertake activities, including publicizing issues and legal defense, related to these businesses.<sup>34</sup> Here again, we conclude that the information requested would primarily serve the interests of the Havens commercial wireless businesses. The 241 Request concerns a waiver request by Amtrak, a matter in which Skybridge and its commercial affiliates have participated as parties. In moving to dismiss Amtrak’s waiver request, Skybridge and its affiliates stated that “[p]etitioners have standing to file this petition since they hold AMTS spectrum [the service subject to Amtrak’s waiver request] nationwide and any substantive action on the subject of Amtrak’s ‘waiver’ request could affect their rights as co-channel and adjacent channel spectrum holders.”<sup>35</sup> In the 242 Request, Skybridge seeks information about Randy Power, a competitor

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<sup>26</sup> See 47 C.F.R. § 0.466(a)(6) (emphasis added).

<sup>27</sup> See Skybridge FOIA Order, para. 15.

<sup>28</sup> 47 C.F.R. § 0.466(a)(6) (emphasis added).

<sup>29</sup> AFR at 2.

<sup>30</sup> 47 C.F.R. § 0.466(a)(6).

<sup>31</sup> *Id.* § 0.466(a)(4).

<sup>32</sup> See Skybridge FOIA Order, paras. 12-14.

<sup>33</sup> See *id.*, paras. 12-14.

<sup>34</sup> See *id.*, para. 13 n.27.

<sup>35</sup> See Petition for Reconsideration and Motion to Dismiss, filed February 25, 2011, by Warren C. Havens on behalf of Skybridge and six other entities.

of Skybridge's affiliate Telesaurus and the subject of litigation by Telesaurus.<sup>36</sup> These statements demonstrate that information requested likely furthers the interests of Skybridge's commercial affiliates.

13. Returning to the Commission's rule for determining whether a reduction in fees is available, we find, for the same reason describe above, that Skybridge has failed to show that the "records are not sought for commercial use" as is separately required for educational and noncommercial scientific institutions seeking reduced fees. Under the conjunctive test in rule 0.470(a)(2), a request for a fee reduction is only granted when records are not sought for commercial use *and* the request is made by an educational or noncommercial scientific institution.<sup>37</sup> Separately and independently from our conclusion that Skybridge is not an "education or noncommercial scientific institution," we also find here that the specific records at issue are likely sought for commercial use by Havens' commercial wireless businesses.

14. While we will carefully examine any new facts that Skybridge may raise in future proceedings, we put Skybridge on notice that if it continues to make repetitious claims without a reasonable basis in fact or law, in light of our precedent and judicial decisions, it may be subject to enforcement action under Section 1.52 of the Commission's Rules,<sup>38</sup> which prohibits frivolous pleadings.<sup>39</sup>

15. **Fee computation in FOIA No. 2011-241.** We modify WTB's computation of the fee for processing the 241 Request. The fee consisted of \$201.63 for search and review and \$4.10 for copying 41 pages.<sup>40</sup> Skybridge's contention that it did not seek copies of 37 pages of the documents released has no bearing on search and review fees, which cover searching for and reviewing all relevant records to determine whether they should be released.<sup>41</sup> However, since Skybridge's request indicated that it did not seek any record that was publicly available, Skybridge should not have been charged copy costs for the 37-page document that was available to the public on the Commission's Electronic Comment Filing System (ECFS). We therefore deduct from the copying fee the \$3.70 charged for reproducing the 37-page document. The new total fee for search, review, and copying is \$202.03.

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<sup>36</sup> See *Telesaurus VPC, LLC v. Power EWA*, 623 F.3d 998 (9th Cir. 2010) (noting that Telesaurus' predecessor-in-interest, Warren Havens, competed with Power in a spectrum auction). We note that the FOIA request gives e-mail addresses for Mark Griffith and Jimmy Stobaugh at telesaurus.com.

<sup>37</sup> 47 C.F.R. § 0.470(a)(2) .

<sup>38</sup> 47 C.F.R. § 1.52.

<sup>39</sup> In connection with more than a dozen FOIA requests, Skybridge has previously claimed entitlement to a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 47 C.F.R. § 0.470(e)(1), which requires a showing that the request would significantly contribute to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. See *Skybridge Spectrum Foundation*, Memorandum Opinion and Order, 26 FCC Rcd 7125, 7125 n.5 (2011). The Office of General Counsel consistently rejected Skybridge's waiver requests on both grounds. The full Commission affirmed these determinations on two occasions prior to the filing of the FOIA requests at issue here. See *Warren Havens*, Memorandum Opinion and Order, 24 FCC Rcd 12308, 12315-16, paras. 15-16 (2009) (finding Skybridge's statement of purpose inconsistent with the claim that its request was not primarily in its commercial interest); *Skybridge Spectrum Foundation*, Memorandum Opinion and Order, 25 FCC Rcd 11064, 11074, para. 24 (2010) (finding that Skybridge had again failed to meet the criteria for a fee waiver). Separately, in appealing six fee waiver denials, Skybridge sought a reduced fee based on the claim that it was a non-commercial educational or scientific requester, thereby eliminating the need to demonstrate that its requests served a public interest. The Commission recently denied this appeal. See *Skybridge FOIA Order*.

<sup>40</sup> See 241 Request at 3.

<sup>41</sup> See 47 C.F.R. § 0.467(b) (search fees may be assessed even if the Commission fails to locate responsive records or the record are determined to be exempt from disclosure).

16. **Search for documents in FOIA No. 2011-242.** We also supplement WTB's finding that it was unable to locate any records responsive to the 242 Request.<sup>42</sup> Although Skybridge did not seek copies of records publicly available online, it did seek information about whether online information was available.<sup>43</sup> The two orders that Skybridge refers to in its FOIA request may be accessed in the FCC Record or through the Commission's EDOCS system. Licensing records regarding Power's station WNXS420 may be accessed through the Commission's Universal Licensing System (ULS). Beyond that, WTB has specifically confirmed that the two letters referenced in Skybridge's FOIA request, which are 17 and 18 years old, are not in existing Commission files.

17. **Procedural matter.** Skybridge contends that the Commission cannot assess fees for processing the two FOIA requests because the responses were outside of the due date.<sup>44</sup> WTB's responses, however, are dated April 6, 2011, within 20 business days of receipt of the FOIA requests on March 9 and 11, indicating that they were timely.<sup>45</sup> Skybridge does not offer any basis for disregarding the stated response dates.

#### IV. ORDERING CLAUSE

18. ACCORDINGLY, IT IS ORDERED, that the application for review by Skybridge Spectrum Foundation IS GRANTED to the extent indicated and otherwise DENIED. Skybridge may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).<sup>46</sup>

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

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<sup>42</sup> See 242 Decision at 1.

<sup>43</sup> See 242 Request at 1.

<sup>44</sup> See AFR at 3; 5 U.S.C. § 552(a)(4)(A)(viii) (agency may not assess search fees if it fails to comply with time limits); 47 C.F.R. § 0.470(a)(1)(ii) (commercial requester may not be assessed search fees if Commission fails to comply with time limit).

<sup>45</sup> See 5 U.S.C. § 552(a)(6)(A)(i) (agency shall determine within 20 business days whether to comply with FOIA request).

<sup>46</sup> We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Skybridge's right to pursue litigation. Skybridge may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road - Room 2510  
College Park, MD 20740-6001  
E-mail: ogis@nara.gov  
Telephone: 301-837-1996  
Facsimile: 301-837-0348  
Toll-free: 877-684-6448.