

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

In the Matter of
SKYBRIDGE SPECTRUM FOUNDATION
On Request for Inspection of Records
FOIA Control No. 2012-190

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 2012

Released: September 14, 2012

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we dismiss an Application for Review (AFR) by Maritime Communications/Land Mobile, LLC (MCLM). MCLM seeks review of a decision by the Enforcement Bureau (EB) granting a Freedom of Information Act (FOIA) request by Skybridge Spectrum Foundation (Skybridge). We find that MCLM is not authorized by our rules to file an application for review. We also deny Skybridge's motion for sanctions, which is contained in Skybridge's opposition to MCLM's AFR.

II. BACKGROUND

2. Skybridge's FOIA Request relates to matters at issue in EB Docket No. 11-71, an enforcement proceeding involving MCLM. EB and Skybridge are also parties to that proceeding. During the discovery phase of the proceeding, the presiding administrative law judge (ALJ) considered requests by EB and Skybridge for the production of 12 boxes of documents. Initially, the ALJ ordered MCLM to provide the documents to EB and gave Skybridge the option of receiving copies of the documents for half the cost of reproduction or of receiving the originals (after they had been inspected by EB) for inspection and copying. Subsequently, the ALJ issued a modified order so that both EB and Skybridge could receive an electronic version of the documents, with standardized page numbering, burned on a CD. The ALJ ordered MCLM to produce the CD containing the documents to EB and ordered MCLM and Skybridge to continue negotiations on terms and conditions for production of the CD

1 See Application for Review of Freedom of Information Action, filed April 23, 2012, by MCLM (AFR). See also Opposition and Motion for Sanctions, filed May 7, 2012, by Skybridge Spectrum Foundation (Motion).

2 See Letter from Gary Schonman, Special Counsel, to Warren Havens, President (Apr. 11, 2012) (Decision).

3 See Letter from Skybridge Spectrum Foundation to FCC FOIA Officer (Feb. 18, 2012) (Request).

4 The parties to the proceeding include not only Skybridge but other entities affiliated with Skybridge. We will refer to all of these parties as "Skybridge."

5 See Order, FCC 12M-8 (ALJ Feb. 7, 2012).

6 See Order, 12M-11 (ALJ Feb. 16, 2012).

to Skybridge.⁷ The negotiations were necessary in part to determine whether Skybridge would pay a portion of the cost for preparing the CD.⁸

3. Skybridge's negotiations with MCLM yielded no agreement,⁹ and, instead, Skybridge filed its FOIA Request, seeking a copy of the CD that MCLM had produced to EB.¹⁰ EB granted Skybridge's request and found that, because the cost of processing the Request was de minimis, no fees would be assessed.¹¹ In granting Skybridge's Request, EB noted that, not only had MCLM not claimed that the contents of the CD were confidential, but also EB had independently reviewed the CD and found that it contained no material covered by any FOIA exemption.¹² EB's order provided that, if MCLM believed that EB's treatment of the FOIA request was in error, MCLM could appeal EB's Decision pursuant to 47 C.F.R. § 0.461(i). On April 23, 2012, MCLM filed its AFR. On May 7, 2012, Skybridge opposed MCLM's AFR and included a motion for sanctions against MCLM and its attorney on the grounds that the AFR is frivolous.¹³

III. DISCUSSION

4. We find that neither of the provisions in our rules allowing for the appeal of FOIA decisions authorizes MCLM's appeal, which will therefore be dismissed. Section 0.461(j)¹⁴ provides that

Except as provided in [§ 0.461(i)], an application for review of an initial action on a request for inspection of records . . . may be filed only by the person who made the request.

Inasmuch as Skybridge, not MCLM, filed the Request, section 0.461(j) does not give MCLM the right to file an application for review.

5. Nor does MCLM's appeal lie under section 0.461(i), which states:

If a request for inspection of records submitted to the Commission in confidence under §0.457(d), §0.459, or another Commission rule or order is granted in whole or in part, an application for review may be filed by the person who submitted the records to the Commission

Although EB indicated that MCLM could file an application for review under section 0.461(i),¹⁵ the plain language of this section provides for a right of appeal only where records have been submitted to the Commission in confidence. MCLM, however, did not request confidential treatment when it submitted

⁷ See *id.* at 2.

⁸ See Transcript, EB Docket No. 11-71 at 402-03, 410-12 (discussion of Skybridge's willingness to pay a portion of duplication costs).

⁹ See Request, Exhibit 1 (e-mail from Warren Havens to [Robert] Keller (Feb. 17, 2012)).

¹⁰ See Request at 1.

¹¹ See Decision at 3.

¹² See *id.*

¹³ See Motion at 1-5.

¹⁴ See 47 C.F.R. § 0.461(j).

¹⁵ See Decision at 3 ("If [MCLM] believes our treatment of this FOIA request is in error, it may file an application for review of of this action with the FCC's Office of General Counsel within 10 days of the date of this letter. 47 C.F.R. § 0.461(i).")

the material contained on the CD and did not subsequently claim confidentiality when EB specifically gave MCLM the opportunity to do so.¹⁶ Further, MCLM's AFR does not claim that the CD contains exempt material. Instead, MCLM argues that EB's grant of the FOIA Request is invalid because its effect is to contravene the ALJ's authority to control discovery in the enforcement proceeding.¹⁷ Because MCLM does not claim that the material that would be released under FOIA is confidential, MCLM's AFR is beyond the scope of appeals authorized by section 0.461(i) and is dismissed.

6. Separate and independent from our dismissal, we note that, if we were to reach the merits, we would deny the AFR. Contrary to MCLM's view, Skybridge's rights under the FOIA are wholly independent of whatever discovery rights it may have. As EB noted in its decision, a FOIA request may be denied only if a FOIA exemption applies, and none applies here.¹⁸

7. We will also deny Skybridge's Motion to the extent it seeks more than dismissal of the AFR. Skybridge asserts that MCLM's AFR violates 47 C.F.R. § 1.52, which requires persons who file pleadings to believe in good faith that there are good grounds to support the pleading.¹⁹ Skybridge contends that MCLM's AFR is frivolous and that MCLM and its counsel should therefore be barred from participation in the FOIA proceeding and the enforcement proceeding. We disagree. While MCLM's AFR is not compliant with the rules, we do not find the pleading frivolous or abusive, particularly in light of EB's apparent invitation to file the AFR.

IV. ORDERING CLAUSES

8. ACCORDINGLY, IT IS ORDERED that Skybridge's Opposition and Motion for Sanctions, filed May 7, 2012, IS GRANTED to the extent it seeks dismissal of MCLM's application for review and otherwise IS DENIED.

9. IT IS FURTHER ORDERED that the Application for Review of Freedom of Information Action, filed by MCLM on April 23, 2012, IS DISMISSED with prejudice as procedurally defective. MCLM may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).

10. The officials responsible for this action are the following: Chairman Genachowski and Commissioners McDowell, Clyburn, Rosenworcel, and Pai.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ See Letter from Gary Schonman, Special Counsel to Robert J. Keller, Esq. (Feb. 23, 2012) (informing MCLM of Skybridge's FOIA request); Letter from Robert J. Keller to Gary Schonman, Special Counsel (Mar. 5, 2012) (MCLM's response).

¹⁷ See AFR at 1 (Questions Presented for Review).

¹⁸ See *Percy Squire*, 26 FCC Rcd 14930, 14933 ¶ 8 (2011) (stating that the FOIA requires agencies to disclose their records unless the records are subject to an exemption, notwithstanding the alleged relationship between the FOIA request and litigation).

¹⁹ See *Warren C. Havens*, 27 FCC Rcd 2756, 2759 ¶ 10 (2012) (Section 1.52 directly authorizes sanctions for filing frivolous pleadings against attorneys and at least by implication justifies sanctions against non-attorneys.).