

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, 2010-538,
On Request for Inspection of Records)	2011-241, and 2011-242
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 2012

Released: June 18, 2012

By the Commission:

I. INTRODUCTION

1. In this memorandum opinion and order, we rule on two petitions for reconsideration filed by Skybridge Spectrum Foundation (Skybridge).¹ Skybridge seeks reconsideration of two Commission orders that denied applications for review filed by Skybridge. The first order (FCC 11-140) upheld a decision by the Office of General Counsel (OGC) that denied Skybridge’s request for a waiver of Freedom of Information Act (FOIA) processing fees with respect to several FOIA requests and held that Skybridge was not entitled to the reduced fee applicable to certain noncommercial requesters.² The second order (FCC 11-152) upheld a decision by the Wireless Telecommunications Bureau (WTB) that responded to other FOIA requests by Skybridge and, in doing so, classified Skybridge as a commercial use requester for purposes of FOIA fees.³ To the extent that Skybridge seeks reconsideration of the Commission’s orders as they relate to the fee rulings by OGC and WTB, we dismiss the petitions for reconsideration as defective because they fail to rely on new or newly discovered facts or arguments as required by the Commission’s rules governing petitions for reconsideration of orders denying applications for review. To the extent that Skybridge seeks reconsideration of certain Commission findings in FCC 11-152 supplementing WTB’s substantive response to Skybridge’s FOIA requests, we deny that petition for reconsideration on its merits. We also deny Skybridge’s request that its petitions should be treated as informal requests for relief or petitions for declaratory rulings.

II. BACKGROUND

2. Skybridge sought waiver or reduction of fees for processing eight FOIA requests. Those fee requests were addressed in the OGC and WTB decisions mentioned above. In FCC 11-140, covering the first six FOIA requests, the Commission upheld OGC’s denial of a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and 47 C.F.R. § 0.470(e). These provisions require that a fee waiver be supported by a showing that disclosure of the records requested is in the public interest because it is (i) “likely to contribute significantly to the public understanding of the operations or activities of the government” and

¹ See Petition for Reconsideration of Denial of Application for Review: Review of Freedom of Information Act Action and Requests Under Section 1.41 and Section 1.2, filed October 27, 2011 (First PFR); Petition for Reconsideration of Denial of Application for Review: Review of FOIA Action and Requests under Section 1.41 and 1.2 and, a Clarification Request [and supplement to First PFR], filed November 14, 2011 (Second PFR).

² See *Skybridge Spectrum Foundation*, Memorandum Opinion and Order, 26 FCC Rcd 13800 (2011) (FCC 11-140).

³ See *Skybridge Spectrum Foundation*, Memorandum Opinion and Order, 26 FCC Rcd 14864 (2011) (FCC 11-152).

(ii) “not primarily in the commercial interest of the requester.” The Commission found that Skybridge failed to meet either prong of the test and that each unsatisfied requirement was an independent ground for denying Skybridge’s waiver request.⁴

3. Also in FCC 11-140, the Commission found that Skybridge failed to qualify as an “educational or noncommercial scientific institution” under 47 C.F.R. § 0.470(a)(2), which would have entitled Skybridge to reduced fees without making a public interest showing.⁵ In FCC 11-152, the Commission again ruled that Skybridge failed to qualify as an educational or noncommercial scientific institution, and thus upheld WTB’s classification of Skybridge as a commercial requester.⁶

4. The Commission’s ruling in FCC 11-140 that Skybridge was not entitled to a public interest-based fee waiver and its rulings in FCC 11-140 and 11-152 that Skybridge did not qualify as an educational or noncommercial scientific institution involved a common finding of fact. In both decisions, the Commission rejected Skybridge’s contention that its requests did not primarily serve a commercial purpose.

5. In both proceedings, Skybridge relied on its classification by the Internal Revenue Service (IRS) and the State of Delaware as a non-profit, tax-exempt scientific, educational, and charitable foundation and on its assertion that it engages in non-commercial activities.⁷ With respect to this latter point, Skybridge submitted that it publishes information on FCC matters in the public interest on its websites, and that these publications attracted tens of thousands of visitors. Skybridge further stated that, in addition to using the information sought in its FOIA requests in FCC proceedings and other litigation, it intends to use the information for educational activities.

6. In rejecting Skybridge’s reliance on this showing, the Commission found that Skybridge’s tax status is not determinative of whether its FOIA requests serve a commercial purpose under the FOIA.⁸ The Commission found that the dispositive factor in determining the commercial or noncommercial purpose of Skybridge’s requests is that the information requested would be useful to commercial entities affiliated with Skybridge and that, consistent with judicial precedent interpreting the FOIA, the interests of affiliated entities should be taken into account, even if the requester itself is a nonprofit organization.⁹

7. In addition to ruling on the fee issues, the Commission, in FCC 11-152, supplemented WTB’s findings on the merits of Skybridge’s request for documents related to two enforcement proceedings. The Commission agreed with WTB that except for two publicly available orders, no responsive documents could be found.

⁴ See 26 FCC Rcd at 13802-04 ¶¶ 10-13.

⁵ See *id.* at 1304 ¶ 15. Commercial use requesters are responsible for all costs for searching for, reviewing, and duplicating the records sought. See 47 C.F.R. § 0.470(a)(1). Educational and non-commercial scientific institutions are responsible only for duplication costs beyond the first 100 pages. See 47 C.F.R. § 0.470(a)(2).

⁶ See 26 FCC Rcd at 14866-68 ¶¶ 9-13.

⁷ See *id.* at 13801 ¶ 3 (summarizing Skybridge’s showing).

⁸ See *id.* at 13803-04 ¶¶ 12-13; *id.* at 14867-68 ¶ 12.

⁹ See *id.* at 13803-04 ¶ 13. The Commission also rejected Skybridge’s claim that it should have been given a further opportunity, pursuant to 47 C.F.R. § 0.470(d), to demonstrate the non-commercial character of its requests. The Commission found that this claim raised at most an issue of harmless error, inasmuch as Skybridge had not identified any further evidence that it would have provided if given the chance. See 26 FCC Rcd at 13804 ¶ 14.

III. DISCUSSION

8. **Fee matters.** To the extent Skybridge seeks reconsideration of the Commission's fee rulings, we find that the petitions are defective under our procedural rules and should be dismissed. The Commission will entertain a petition for reconsideration of an order denying an application for review only if the petition relies on "facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission" or on facts or arguments unknown to the petitioner until after his last opportunity to present them to the Commission."¹⁰ For the most part, Skybridge's pleadings restate its argument summarized at paragraph 5, above, that its requests serve a noncommercial purpose. Skybridge thus reasserts arguments, already rejected by the Commission,¹¹ that the Commission should rely on Skybridge's nonprofit classification by the IRS and the State of Delaware to find that its FOIA requests are not commercial.¹² To the extent Skybridge does so, the facts and arguments presented are neither new nor newly discovered and thus not proper grounds for seeking reconsideration of an order denying an application for review.

9. Skybridge presents some ostensibly new facts and circumstances in support of its contention that its requests serve a noncommercial purpose.¹³ Skybridge represents that it: (1) has expanded its educational and publishing activities; (2) has expanded its activities challenging various government activities; (3) has initiated litigation challenging a Commission rulemaking action; and (4) is participating in a Commission enforcement proceeding. These are, however, the same kinds of activities described in Skybridge's earlier pleadings, and already were considered by the Commission.¹⁴ They do not alter the commercial purpose analysis and do not cure the defect in Skybridge's petitions noted above.¹⁵

10. In addition to asking for reconsideration, Skybridge asks us to treat its pleadings as either informal requests for Commission action (under 47 C.F.R. § 1.41) or petitions for declaratory ruling (under 47 C.F.R. § 1.2).¹⁶ See First PFR at 2; Second PFR at 2. Skybridge's pleadings are in substance petitions for reconsideration, and we will treat them solely as such.

11. **Adequacy of search.** Skybridge submits an additional basis for seeking reconsideration of FCC 11-152. In that order, the Commission supplemented WTB's response to Skybridge's request for documents concerning two enforcement proceedings.¹⁷ The Commission found that the only documents responsive to Skybridge's request were two orders that are publicly available online. The Commission further stated that copies of two letters referenced in these orders were not in the Commission's files.

¹⁰ See 47 C.F.R. §§ 1.106(b)(2) and 1.115(g)(1) (slight variations in wording).

¹¹ See *supra* para. 6.

¹² See First PFR at 3-7; Second PFR at 3-9.

¹³ See First PFR at 7-8; Second PFR at 9-10.

¹⁴ As discussed in para. 5, Skybridge has argued all along that its educational, publishing, litigation efforts, and participation in FCC proceedings demonstrated a primary noncommercial purpose because they are assertedly in the public interest. The Commission has consistently rejected this argument.

¹⁵ The underlying rationale for Rules 1.106(b)(2) and 1.115(g) is "that reconsideration will not be granted for the purpose of again debating matters that have been fully considered." See *Greater Media Radio, Inc.*, 15 FCC Rcd 20485, 20485 ¶ 2 (2000) (applying § 1.106(b)(2)). New facts that are not materially or significantly different from facts already before the Commission when it denied review raise matters that have already been fully considered.

¹⁶ See First PFR at 2; Second PFR at 2.

¹⁷ See 26 FCC Rcd at 14869 ¶ 16.

12. Skybridge asserts that responsive records other than the two publicly available orders must exist.¹⁸ Skybridge also questions why the two 17- and 18-year old letters were not found.¹⁹ The petition, however, gives us no basis to believe that other documents still exist²⁰ or were not diligently pursued. We note that under the Federal Records Act and FCC Records Schedules, there was no requirement or need for the Commission to retain these documents.²¹ We therefore have no reason to reconsider this matter and deny Skybridge's petition in this regard.

IV. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that the petition for reconsideration filed by Skybridge on October 27, 2011, with respect to FCC 11-140, IS DISMISSED with prejudice as procedurally defective, and the petition for reconsideration filed November 14, 2011, with respect to FCC 11-152, IS DISMISSED IN PART with prejudice as procedurally defective to the extent indicated above and IS OTHERWISE DENIED to the extent indicated above. Skybridge may seek judicial review of this action, pursuant to 5 U.S.C. § 552(a)(4)(B).

14. 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

¹⁸ See Second PFR at 11-12.

¹⁹ See *id.* 10-11.

²⁰ See *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (an agency must conduct a search reasonably calculated to uncover all relevant documents.) The issue is not whether additional documents might conceivably exist but whether the search was adequate.

²¹ See 44 U.S.C. § 3303(3) (agencies to submit schedules for disposal of records). The relevant provisions of the Enforcement Bureau schedule specify disposal after 2-3 years.