

## Skybridge Spectrum Foundation

---

April 5, 2012

FCC FOIA officers and staff, to and via:

Roger Noel, [Roger.Noel@fcc.gov](mailto:Roger.Noel@fcc.gov)

Joyce Jones, [joyce.jones@fcc.gov](mailto:joyce.jones@fcc.gov)

Re: FCC FOIA Control No. 2012-203: Skybridge Spectrum Foundation (“SSF”).

Re: Docket 11-79

This timely reply to the responses of the “Interested Third Parties” (or “3 Parties”) (“3 Objections”) under the March 12, 2012 letter from Mr. Roger Noel to the SSF and the 3 Parties.

Notwithstanding the 3 Objections, the requested records (“Records”) should be released, with possible redactions noted below, for the following reasons.

### The Records are Non Commercial

(1) PTC 220 LLC has publicly stated before the FCC the non-commercial nature of the subject records:

Despite the allegations of SkyTel, the freight railroad industry purchased 220 MHz spectrum to develop a non-commercial PTC system for monitoring train activity, preventing train collisions, and enhancing public safety, not for a profit incentive. Spectrum acquisition is one of several significant expenses being incurred to meet the rigorous roll-out requirements for PTC. There is no profit incentive driving the choice of 220 MHz spectrum for PTC....

Proceeding: 11-79, Name of Filer: PTC-220, LLC, COMMENT, 7/12/11 8:38 AM (emphasis added). (“SkyTel” means *SSF, the FOIA requester*, and telecom LLC that support SSF.) This PTC 220 LLC Comment also stated:

In addition, access to the spectrum should be available to all railroads on an equal cost basis. This concept should flow through to any secondary markets transactions. Thus, if a licensee receives spectrum from the Commission without cost, any lease of that spectrum to another railroad for PTC use should likewise be on a no-cost basis.... PTC-220 was organized to operate without making any profit for its member railroads [and noted above- all railroads should have equal cost basis].

Regarding the first cite above, it is clear that the requested records of a non-commercial, not for profit, no profit basis, and thus are not of a commercial competitive nature.

Regarding the second cite above, this further shows that the PTC 220 LLC formula for secondary market spectrum transactions for PTC is that, whatever the cost was of the spectrum when obtained, nothing should be added if the spectrum is offered to a railroad. Again, the clear assertion is that the spectrum transaction will be of a non-commercial nature.

Thus, the requested Records are of a non-commercial nature, without claim of commercial competitive harm or the like.<sup>1</sup>

Unless PTC 220 LLC retracts the above-- (and explains how it was incorrect in the assertions above, in its attempt there-- *which was first to keep its own 220 MHz spectrum*)-- neither PTC 220 LLC nor Alaska Railroad Corporation (ARC) (or other related party in this FOIA matter) may credibly argue for FOIA withholding exemption by suggesting the records are of a commercial competitive nature or the like. SSF asserts, however, that any retraction would not currently be effective with regard to waiver and estoppel that should apply to PTC 220 LLC in this subject FOIA matter since it used those assertions for relief from the FCC in legal proceedings (including, as noted, to keep its 220 MHz licenses).

Records Obtained by Government, *Critical Mass*,  
Workings of Government, etc.

(2) While item '(1)' above is sufficient to show the need to release the requested documents, *Critical Mass*, 975 F.2d 871 does not appear to support withholding *where the records sought were obtained by the government by its request or direction*, as opposed to voluntarily provided.

The ARC Opposition several times explains that the FCC staff requested information for which the subject records were provided in response. *Critical Mass*, in such case, supports

---

<sup>1</sup> SSF is seeking in this FOIA what must be made easily accessible to government railroads publicly. They do not engage in competitive RFPs when they are supplied at no cost or at cost basis, what they need. State agencies are subject to State FOIA laws. They do not keep confidential documents of their relations with non-profit providers outside commercial competition. (E.g., a California railroad agency under the State, SCRRA [“Metrolink”] disclosed to SkyTel PTC 220 LLC documents related to its PTC programs, where the State FOIA law was essentially the same as Federal FOIA).

If ARC wants "competition" in the nonprofit, non-commercial area of spectrum for PTC, SSF will be glad to compete publicly and state SSF's price and terms, and have PTC 220 LLC do the same. SSF is a nonprofit operating foundation formed to hold and use spectrum to assist in meeting public interest goals, including for Intelligent Transportation Systems). However, despite inquires by SSF in that regard, ARC has not pursued a request to SSF to provide 217-222 MHz spectrum for its PTC or other purposes (in spite of several inquires and follow ups by SSF). ARC appears satisfied by the *non-profit* offering of PTC 220 LLC, and it is public record that ARC already has business contract relations with PTC 220 LLC's equipment company, Meteorcomm LLC for radio equipment. E.g., see p. 3 in: <http://www.fra.dot.gov/downloads/research/rr0916.pdf>

disclosure. The government may not request information but for its lawful purposes. A government request and an instruction are not different since the government has no right to request information not in the public interest under its applicable law. The subject proceeding is a permit-but-disclose proceeding.

The FCC staff request for information in response to which the Records were submitted to the FCC is understandable due to the PTC 220 LLC representations cited above, both under its self-proclaimed public interest under the subject proceeding (to assist railroads, including government-owned ones, to meet the Congressional PTC mandate) and also to test the above-cited representations of PTC 220 LLC made, as noted above, *first to defend its own 220 MHz spectrum* that is being maintained by certain waiver arrangement involving its pledged spectrum lease program.

Where a State run railroad, in this case ARC, discussed its needs for PTC spectrum and noted PTC 220 LLC as a potential supplier, it would be within FCC interests for FCC staff to request documents of evidence (or lack thereof) as to PTC 220 LLC asserted non-commercial, not-for-profit, no-cost leasing program involved, that was represented to the FCC in relation to the FCC grant of waiver relief, and to understand how the FCC may assist in meeting this Congressional mandate, including whether the Farquhar-PTC position in the docket (in part noted below) has a basis or not.

(3) Also, the FCC cannot keep confidential any records that are essential for, or materially used for, the grant or sustaining of rule waiver grants-- which are *public*, and which effect the *public* spectrum markets.

(4) Separate from '1', '2' and '3' above, ARC cannot itself (since it is not PTC 220 LLC) certify that the subject PTC 220 LLC records ARC gave to the FCC in this open proceeding were or were not *already in the public domain* (apart from the delivery of the documents in this proceeding, which at least potentially made them available for FOIA release into the public domain). It is ultimately not relevant whether ARC believes it had a confidentiality obligation that its employee breached, if that was waived by the subject records being in the public domain, not due to ARC. However, as noted above, PTC 220 LLC itself represented the that subject leasing underlying the subject records (and thus, the records) are of a non- commercial-competitive nature.

(5) ARC cannot speak for PTC 220 LLC as to what, besides the non-commercial economic information<sup>2</sup> in the requested records, may be confidential and proprietary, such as patents or trade secrets in a technical design. To the degree PTC 220 LLC asserted that, that is questionable to begin with since Meteorcomm LLC has no radio products listed on its website- it has no products at all listed (it used to but now does not). But assuming there is such technical

---

<sup>2</sup> Price and terms in a non-commercial spectrum lease are all economic-- part of the non-commercial nature.

or other non-economic information in the requested document, then it may be withheld if it not already in the public domain—and if it fits into the criteria of *Public Citizen* discussed below. However, it would make no sense for this non-economic information to be confidential and proprietary since PTC 220 LLC clearly stated above that it was formed to provide spectrum to all railroads on a non-commercial non-profit basis and the technology and radio products involved were, as shown in public records, a secondary enabling action: PTC 220 LLC bought Meteorcomm for that non-commercial non-profit program.

Thus, it does not appear that any information in the requested records can be withheld, but if any actual, demonstrated technical confidential and proprietary information is demonstrated in a proper showing (such as is in some OET equipment type approval application and grants), then that potentially could be withheld, further discussed below.

### Public Citizen Applies Here

In *Public Citizen v. Food and Drug Administration*, 704 F.2d 1280 (1983) (“*Public Citizen*”), the DC Circuit Court found (emphasis and text in brackets added, footnotes in original deleted):

The District Court held that the requested records, which were produced during ongoing clinical studies of the safety and efficacy of IOLs, are immune from disclosure under Exemptions 3 and 4 of the FOIA.... These exemptions allow agencies to withhold, respectively, (1) records that are "specifically exempted from disclosure by statute" if the relevant statute satisfies one of two limiting conditions and (2) "trade secrets and commercial or financial information obtained from a person and privileged or confidential.".... We believe that the District Court erred in its application of Exemption 3 and adopted an overly broad construction of the term "trade secrets" in Exemption 4. With respect to most of the documents, however, these errors are of little consequence since the District Court properly concluded that the records contain confidential "commercial information."

\* \* \* \*

... Restatement of Torts, see note 7 supra, has been adopted verbatim by the FDA.

\* \* \* \*

The Restatement definition has achieved acceptance in a variety of private law contexts, see 1 R. MILGRIM, TRADE SECRETS § 2.01 (1982); however, it is far from clear that Congress intended it to govern in FOIA cases. A number of courts had adopted a more restrictive definition of trade secrets prior to the adoption of the FOIA. Under the restrictive definition, trade secret status is reserved for information involving "the productive process itself, as opposed to collateral matters of business confidentiality such as pricing and sales volume data, sources of supply and customer lists." 16

\* \* \* \*

Since we are bound by neither the agency's interpretation nor judicial precedent, we feel free to repudiate the broad Restatement approach and the FDA's regulation as inconsistent with the language of the FOIA and its underlying policies. In our opinion, the term "trade secrets" in Exemption 4 of the FOIA

should be defined in its narrower common law sense, which incorporates a direct relationship between the information at issue and the productive process. Accordingly, we define trade secret, solely for the purpose of FOIA Exemption 4, as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.<sup>23</sup> *[and as noted above not collateral matters of business confidentiality such as pricing and sales volume data, sources of supply and customer lists.]*

Thus, under *Public Citizen*, the 3 Requests cannot assert as exempt from disclosure the Records or parts of the Records that (i) contain information on collateral matters of business confidentiality such as pricing and sales volume data, sources of supply and customer lists,” *In addition,*

*Public Citizen* also found:

If a document does not contain trade secrets, the District Court continued, it is necessary to consider whether disclosure would reveal exempt "commercial or financial information" under the test adopted by this court in *National Parks & Conservation Association v. Morton*, 162 U.S. App. D.C. 223, 498 F.2d 765 (D.C. Cir. 1974) ("National Parks I"), and refined in *National Parks & Conservation Association v. Kleppe*, 178 U.S. App. D.C. 376, 547 F.2d 673 (D.C. Cir. 1976) ("National Parks II"), and *Gulf & Western Industries v. United States*, 615 F.2d (D.C. Cir. 1979).

As shown above, the Records related to PTC 220 LLC have a non commercial purpose; any financial information in them as to customer pricing and costs and the like is not a trade secret; and said financial and other information is of a non profit, non commercial nature, not in commercial competition with a basis for confidentiality. However, if any information in the Records is, apart from the above, a trade secret under *Public Citizen*, that appears to be information that may be withheld under the Court’s narrow definition of trade secrets above.

#### Farquhar-PTC 220 LLC Misstatements & Workings of Government at Issue in the Records

The following *is relevant to this FOIA matter* as indicated in places below, including since the Records are of core importance to several FCC proceedings involved (workings of the government).

The Objection filed by Michele Farquhar for PTC 220 LLC and its related parties (that also filed objections) (together, “Farquhar-PTC”),<sup>3</sup> diverts into misstatements (some of which appear to be misrepresentations) that only further shows why the Records are not legitimately subject to alleged FOIA exemptions. These include:

---

<sup>3</sup> Some attorneys at law outside and inside the FCC have a practice of calling entities Havens manages as “Havens.” We may adopt this practice in cases.

Initially, Farquhar-PTC misstates that “Havens” is acting through SSF, a nonprofit corporation, and in suggesting SSF is not an independent actor in this case. That is false and no evidence is presented to support that. Farquhar knows it to be false, including since she formerly represented legal entities before the FCC managed by Havens that she fully understood were distinct under law from Havens.<sup>4</sup> The primary legal requirement for a nonprofit corporation recognized as tax exempt by the IRS, as SSF is (shown in FCC records and accepted by the FCC) is that the no individual, including the management, of such a nonprofit entity can have any ownership or get benefits of ownership or control from the nonprofit.

Farquhar-PTC misstates that the Records and underlying programs are commercial and competitive *for reasons cited above*.

Farquhar-PTC cannot have it both ways: to assert—to keep the 220 MHz licenses it maintains by special FCC waivers—that is it acting on a non profit non-competitive basis to assist all railroads with its spectrum—but now to assert its real program is to compete commercially on a for profit basis with the same spectrum.

Why would any railroad seek to buy spectrum on commercial basis if Farquhar-PTC is standing by them to provide on non-profit basis the spectrum?

Indeed, as noted above, at least facially that appears what ARC has arranged with Farquhar-PTC since ARC has no interest in any competing offer from any legal entity the undersigned manages.<sup>5</sup> SSF has no objection to that if it were true: SSF encourages private companies to first act in the public interest and engage in nonprofit actions in support of important government programs, and only on that platform to seek fair and reasonable profit in compliance with applicable public regulatory agency requirements and other law. PTC 220 LLC and its members got their main assets—land and rights of way—from the public. They are thus subject to forms of eminent domain, but also to equitable public-agency support in return.

---

<sup>4</sup> Farquhar and her law firm provided legal services to the Havens-managed entities in relation to obtaining AMTS spectrum including in Auction 61 where she and her law firm properly defended said Havens-managed entities rights as the lawful high bidders. Subsequently, Farquhar made it clear to Havens, the undersigned, that her firm’s larger clients had objections to positions of the Havens entities, and the firm then ceased providing counsel. Thereafter, Farquhar and her firm took contrary positions, adverse to their former clients the Havens-managed entities and advise given to them, including by representing SCRRA (Metrolink) and PTC-220 LLC in their assertions that they may effectively launder the defects in the AMTS licenses another party obtained in Auction 61 in violation of FCC rules and rights of the Havens-managed entities that placed the lawful high bids and thus had claims to all said spectrum. That is contrary to professional code. It is thus not surprising that Farquhar-PTC engage in the misstatements noted herein which is further violation of professional obligations as reflected in FCC rules 1.52 and 1.24.

<sup>5</sup> Railroads got public lands and rights of way largely for free, and are subject to certain forms of eminent domain.

In this case, if what PTC 220 LLC tells the FCC (as reflected in cites above) is true and not a device, to use its 220 MHz spectrum on non profit non commercial basis to help all railroads implement PTC, then that is a of course favorable and appropriate for the public interest especially for government-run railroads, and given the large public stake in the PTC 220 LLC member railroads. *However, that is not what the Records appear to reflect based on the communications to and from the FCC as to the delivery of the Records to the FCC, and based on the 3 Objections.*

Farquhar-PTC write: “What is clear, however, is that Mr. Havens objects to PTC-220’s use of its own spectrum, lawfully acquired in the secondary market and appropriate to support PTC technologies, to meet the railroads’ statutory mandate to implement PTC by 2015.” That is false, and Farquhar cited nothing as to that bald assertion: “what is clear . . .” In any case, the obvious diversion here is that SSF is not “Mr. Havens,” and even if there was any such “clear . . . object[ion],” it is not relevant.

Why is Farquhar-PTC diverting the FCC in this FOIA matter?

Is it apparently for the reasons shown herein: PTC asserts, to keep its 220 MHz licenses, that is it assisting all US railroads on non profit basis to use its 220 MHz spectrum, but that appears to be false. Why did the FCC ask the ARC representatives for information that led to the Records being filed with the FCC, and why did that representative express a need for some alternative to Farquhar-PTC spectrum, if that was being provided at a non profit basis as Farquhar-PTC told the FCC to keep that spectrum?

Contrary to the Farquhar-PTC Objection, these are matters upon which the Records will shed light, are these are central to the workings of the government, the FCC in this matter.

The Records are *not* simply some information that by error the FCC obtained by a request and the ARC provided apart from the core purpose of docket 11-79, and the major role of Farquhar-PTC in that docket.

Contrary to the Farquhar-PTC Objection, a FOIA requester does not have to demonstrate anything when making a request as to whether requested documents must be released. That, by a law firm, has to be taken as an attempt to confound and delay the proceeding, in violation of rule 1.52.

Contrary to Farquhar-PTC, SSF (and other Havens-managed entities) did not act in docket 11-79 contrary to its purposes or PTC, but they acted strongly in favor of viable railroad wireless including actual PTC, and in support of public disclosure of the real facts involved, the real need and lack of need for particular spectrum in range and bandwidth, etc.

In fact, the FCC has stated recently in the docket that railroads will not be provided any relocation of spectrum or other special spectrum action by the FCC—contrary to the positions of Farquhar-PTC. (See presentation by Richard Arsenault on this subject, in a Powerpoint

presentation, apparently also presented to the PTC conference in February 2012 in Florida.) Farquhar-PTC failed over and over in the docket to show factual support for their calls for large amount of additional spectrum for PTC, and even in defining PTC and a PTC system in any coherent fashion. As Ron Lindsey explained in detail in the docket, PTC as defined by Congress is not what Farquhar-PTC pretends it is (and now that PTC 220 LLC suggests it is in their filings before the FCC to maintain their 220 MHz licenses under special waiver relief), nor does PTC require 200 MHz range spectrum, or does it require much spectrum at all.

Contrary to Farquhar-PTC, the position of SSS (and other Havens managed entities) in the docket *is the opposite of commercial competition*. For the obvious reason that if their position as to PTC wireless is accepted, then railroads will not seek any commercial or other business relation with SSF and other Havens-managed entities. *Farquhar-PTC do not seem to understand the concept of honesty in the public interest*. Indeed, the SSF – SkyTel position is that PTC 220 LLC by itself has ample spectrum for PTC (PTC by itself, not other things added) in all parts of the country for all railroad: PTC requires virtually no data. The need for a modest number of channels is for spectrum reuse / interference reasons, not for data capacity. What is objectionable, and is abuse of FCC process, is for Farquhar-PTC to represent to the FCC to keep its 220 MHz spectrum licenses under special waivers that it is providing at no profit its spectrum for all railroads for PTC, but then to not do that. That is also violation of Sherman Act 1 in that such misrepresentation misleads the markets, and artificially restrains lawful interstate trade and competition in the market.

As indicated above, the requested Records are relevant to the workings of governments, including purposes of docket 11-79 as well as the related proceeding regarding Farquhar-PTC 220 MHz licenses waiver relief as to the Farquhar-PTC representations of non profit use of the subject spectrum as indicated above.

#### Other

The 3 Objections do not demonstrate *why it was proper and within the FCC public purposes to request* records from the representative of ARC which resulted in the Records being provided to the FCC. Indeed, it was railroads lead by Farquhar-PTC that were the causes of the subject docket 11-79. In the docket, they called for “reallocation” of spectrum by any means, including the 217-220 MHz spectrum of SSF (and other entities managed by the undersigned). SSF and other Havens-managed entities (together, “SkyTel”) showed in that docket, including with authoritative data and an independent expert in railroad PTC and wireless, that Farquhar-PTC mislead the FCC as to the alleged dire need for huge amounts of additional 217-222 MHz spectrum for PTC, and that Congress effectively mandated that band to be used for PTC.

The 3 Objections do not demonstrate that the alleged breaches of the alleged confidential information in the Records were subject to any action that would have been taken if the information was indeed confidential (and any confidentiality was not waived or excused).

The 3 Objections did not satisfy the requirements of detailed showings to demonstrate why the Records should not be released, including due to lack of demonstrated facts and also how asserted facts lead to correct legal conclusions under FOIA law, including the above cited controlling case precedents.

The FCC letter noted initially above, dated March 12, 2012 attached one of the Records sought as the last page. The issue of its further release thus appears moot.

### Conclusion

For all of the above reasons, the Records should be released in full or at least with only “trade secrets” that may possibly fall within Public Citizen criteria redacted.

But for that possibility, the Records do not contain not trade secrets, or competitive commercial confidential information including financial information, and any such characterization has been waived and estopped.

In addition, the government (FCC) properly requested the Records for its purposes, and under Critical Mass and other facts of this case, the Records should released.

[The rest of this page is intentionally left blank.]

Respectfully,



Warren Havens  
President  
*Skybridge Spectrum Foundation*  
2649 Benvenue Ave  
Berkeley CA 94704  
[www.scribd.com/warren\\_havens/shelf](http://www.scribd.com/warren_havens/shelf)  
510 841 2220 x 30  
510 848 7797 -direct

---

Email copies to:

Ms. Jones at [joyce.jones@fcc.gov](mailto:joyce.jones@fcc.gov), and

[hupprichw@akrr.com](mailto:hupprichw@akrr.com)  
William R. Hupprich  
Vice President & General Counsel  
Alaska Railroad Corporation

[mkohler@avec.org](mailto:mkohler@avec.org)  
Meera Kohler  
President & CEO  
Alaska Village Electric Cooperative, Inc.

[michele.farquhar@hoganlove1ls.com](mailto:michele.farquhar@hoganlove1ls.com)  
Michele Farquhar  
Hogan Lovells US LLP  
Counsel for PTC-220

[gcranor@meteorcomm.com](mailto:gcranor@meteorcomm.com)  
Guy Cranor  
Project Manager  
Meteorcomm LLC