

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

In the Matter of Freedom of Information Act Requests of Warren Havens and Skybridge Spectrum Foundation	FOIA Control Nos. 2013-021 and 2013-022 Review of Freedom of Information Act Action
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To: the Commission Attn: Office of General Counsel

Response to to Opposition of Maritime to
Application for Review: Review of Freedom of Information Act Action
and
Request for Sanctions under § 1.52

Warren Havens (“Havens”) and Skybridge Spectrum Foundation (“SSF”) (together, “Petitioners” or “we”) submit this Response to the Maritime Opposition in the captioned matter (“Opp”). This is filed with OGC by email, as has been accepted in this proceeding to date.

- (i) -

We reference and incorporate our Reply to the Opposition of Pinnacle in this proceeding.

Mr. Keller (“Keller”) does not address FOIA exemption 7 that is at issue in the subject appealed FOIA decision. The OGC called on him to address the subject appeal and provided him additional time for that, which prejudiced the FOIA requesters, the Petitioners.

An essential element of FOIA, shown in deadlines in the statute, is speed, and any delay such as this undermines the purpose of FOIA and the rights of requester under FOIA. The Opposition is, for this reason to begin with, improper. Petitioners also assert that the said call upon Keller was improper and prejudicial since there was no reason that Keller could not have submitted a substantive opposition on time, had he been willing and able, or if not, why he could not have asked for more time and provided good cause. The FCC should not extend relief when it is not requested, and where it causes prejudice to other parties in a proceeding, as in this case. That suggests that the FCC OGC is not acting objectively to defend the FOIA denial decision,

but seeks the help of a party in a restricted proceeding to support the FCC position. Petitioners reserve all rights in this regard, if and when they file an action in a US District Court regarding this FOIA case, including for fees under The Equal Access to Justice Act, 5 U.S.C. 504, and FCC rule § 1.1501.

As with the Maritime-Keller other positions in this Hearing,¹ and as with Maritime's long history described in the HDO FCC 11-64 that commenced this Hearing, the Maritime-Keller position in the Opp is at odds with clear rules, and uses straw-man and other spurious arguments in violation of section 1.52 to delay legal process to find Maritime and its agents in serious

¹ Including arguments, contrary to clear rules and Orders, as to what a constructed and operational station is, and that they need not involve actual service, and that the licensee need not have kept copies of the licenses and stations it purchased as to the actual history of said construction, operation, and service (the "NCASS boxes" travesty)—and so forth. It is a serious abuse of process, and wasteful of public FCC resources, for the FCC to pander to and tolerate this, year after year, in the name of practice of law and protection of the obvious wrongdoer shown in admitted facts. Keller is not only in violation of Section 1.52, but is engaged barred practice of law in as much as he is protecting a client that is shown in the record (what to speak of the additional information he must have) as engaged in fraud on the United States and repeated criminal violations under 18 USC §1001. See online page at: http://www.law.cornell.edu/ethics/dc/code/CRule_1.6.htm: The following from this page applies to Keller and Maritime:

The D.C. Court of Appeals has held that the crime-fraud exception to the attorney-client privilege requires that a lawyer's services were actually used to further a crime or fraud that occurred.... See *In re Public Defender Service*, 831 A.2d 890 (D.C. 2003). The Rule 1.6(d) exception to the ethical duty of confidentiality also requires that the lawyer's services actually were used to further a crime or fraud. A client can prevent disclosure by refraining from the wrongful conduct or by not using the lawyer's services to further a crime or fraud. Although Rule 1.6(d)(1) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(e). Rule 1.16 addresses the lawyer's obligation or right to withdraw from the representation of the client in such circumstances if withdrawal is necessary to prevent the client from misusing the lawyer's services or if withdrawal would otherwise prevent, mitigate, or rectify substantial injury caused by the client who misused the lawyer's services.

repeated violation of FCC law.² The undersigned thus asks that Keller be sanctioned under section 1.52.

- I -

Opp ¶¶ 4-5: The Maritime argument cites not authority in the text or the related footnote that is shown to be relevant to the argument. However, the FCC formal hearing rules and procedures provide for Enforcement Bureau to act as prosecutors, and that a party may use FOIA to seek Commission records without restriction to what part of the FCC holds the records or how the records were obtained.

§ 1.311 General.

Sections 1.311 through 1.325 provide for ... for the production and preservation of evidence for use at the hearing, or for both purposes.

(a) Applicability. For purposes of discovery, these proecedures may be used in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing....

* * * *

(3) Commission records are not subject to discovery under § 1.325. The inspection of Commission records is governed by the Freedom of Information Act, as amended, and by § § 0.451 through 0.467 of this chapter.

§ 1.325 Discovery and production of documents and things for inspection, copying, or photographing.

* * * *

(b) Any party seeking the production of Commission records should proceed under § 0.460 or § 0.461 of this chapter. See § § 0.451 through 0.467.

The above was discussed in: *In the Matter of Amendment of Part I, Rules of Practice and Procedure To Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings, MO&O, FCC 82-450, 91 F.C.C.2d 527 (1982)*:

² In addition, he acts both as MCLM representative counsel in the Hearing under 11-71, which in large part turns upon the MCLM asserted “Second Thrusday” relief entitlement—and as the MCLM Second-Thursday expert witness, as show in his written and oral testimony in the bankruptcy case. That poses a conflict (including under DC Bar rule 3.7) that prejudices the other parties to the Hearing and, at minimum, required disclosure and subjecting any defense to challenge.

The Commission has under consideration a "Report on Evaluation of the Federal Communications Commission's Discovery Procedures in Adjudicatory Hearings" (hereafter Report). n1

n1 The 96 page report was prepared by Max D. Paglin, Esquire, under contract to the Commission....

3.... Commission records are not subject to discovery under Section 1.325, but may be available under the Freedom of Information Act (5 U.S.C. 552) and pertinent Commission rules (Sections 0.451-0.467).

Keller suggests, without citing the above Hearing rule sections, that "Commission records" subject to FOIA requests described in those rules, cannot include records of the subject Hearing produced to the Commission's trial staff. However, those would be the most relevant records under the above cited rules. In addition, another formal Hearing rule discusses Commission records in a formal hearing (emphasis added):

§ 1.203 The record.

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision. Where any decision rests on official notice of a material fact not appearing in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Thus, "Commission record" under Section 1.325 subject to a FOIA request cannot reasonably mean to exclude (even if one attempted to interpret a clear rule) the records of the subject Hearing. Moreover, a recent Commission *MO&O* in an analogous case (citing other analogous cases) supports our assertion that the requested records are Commission records for the purpose of FOIA and cites to other authorities, *In the Matter of Ted Hudaco, MO&O, FCC 12-158*: an alleged privileged document submitted in the FCC LOI investigation of apparent rule violations and false certifications is a Commission record for FOIA purposes, citing in support (underlining added):

24 See *RCA Global Communications, Inc. v. FCC*, 524 F. Supp. 579, 583 (D.Del. 1981) (finding documents produced by regulated communications company in response to an FCC investigatory subpoena were agency records for purposes of the FOIA) and *Teich v. Food and Drug Administration*, 751 F.Supp. 243, 247-49 (D.D.C. 1990) (finding summary of consumer complaints which was submitted to the Food and Drug Administration (FDA) upon request became an

agency record within the meaning of the FOIA once it was filed with the FDA where the complaint summary was drafted at the specific request of the agency in the legitimate conduct of its official duties); cf. *FCC v. AT&T*, 131 S.Ct. 1177 (2011) (upholding FCC Order granting competitors' FOIA requests for documents FCC obtained from petitioner during course of an FCC investigation).

Further, contrary to Keller, the Enforcement Bureau is not just another party, but is acting for the Commission in a formal hearing and remains a party of the Commission. It is not required to enter a notice of appearance, as is required for the non-FCC parties for that reason: it is the Commission in the case. The Hearing is not in a court, and if it were, then the DOJ would represent the Commission in some cases, and the OGC in other cases.

In essence, Keller employs straw-man arguments including:

For the Enforcement Bureau to share any information with other parts of the agency, much less confidential information, obtained by it in the course of the hearing proceedings would clearly violate the letter of the ex parte rules as well as the spirit of having a fully separated trial staff prosecuting the case. To conflate the Bureau and the Commission would gut the entire structure designed to ensure fairness and due process in the hearing proceeding.

That is a spurious argument since the subject rules cited above including section 1.325 by providing for use of FOIA requests does not cause any conflict with or breach of protections afforded to any party to a Hearing, nor does it "force" the trial staff to "share...confidential information." The Commission and its parts get information asserted as confidential all the time, some voluntarily submitted and other by FCC request or requirement, but that does not bar FOIA requests seeking the records with the asserted confidential information. FOIA has well-established rules, standards, and procedures by which the federal agencies determine if any records sought have confidential, or other, information which should be protected from release. Keller suggests speciously that the subject FOIA request is more than it is and is permitted to be: a simple FOIA request, in this case, not even submitted with knowledge of what is the nature of the records sought. As with all FOIA requests, ones submitted under the above cited formal

Hearing rules are subject to the FCC FOIA officers in or guided by OCG to determine what must be released and what must not.

Opp ¶¶ 6-7. Keller cites the Protective Order to suggest that this order trumps a rule, but agency Orders must follow and apply rules, not be made or asserted contrary to rules. The rules are cited above including section 1.325. In addition, the Protective Order recognizes at ¶ 2(d) FOIA exemptions, and commences as follows (and was proposed by the Enforcement Bureau as follows) (emphasis added):

1. This Protective Order ("the Order") is intended to protect information that has been designated "Confidential Information" or "Highly Confidential Information" as those terms are defined herein, contained in (i) documents that are produced, given or exchanged by and among the Parties, or produced by non-parties, as part of discovery in this Proceeding; (ii) documents that have been provided to the Federal Communications Commission ("the Commission") in connection with any investigation concerning Maritime Communications/Land Mobile, LLC ("Maritime") that pre-dated this Proceeding; and (iii) documents and testimony in this Proceeding. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information or Highly Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

It is a violation of section 1.52 to argue as Keller does based on this Protective Order ("PO"), not only since an order, if lawful, cannot violate agency rules (see above), but in addition, this PO, proposed by the EB, properly follows rule section 1.325 and recognizes that documents and information asserted as confidential or highly confidential under the PO do not escape a determination under FOIA "upon a proper request under the Freedom of Information Act...." That of course is based on the premise that someone may submit a FOIA request for documents submitted under the PO alleged as confidential or highly confidential—exactly the case at issue here.

Opp ¶ 8. It is a further violation of section 1.52 to make this argument under a Protective Order definition that "The requested items are thus presumptively exempt," while ignoring what comes right before it, cited above that there is no such presumption. Section 1.52

requires the attorney to know what it is signing has merit: this §8 argument could not be more in violation of this required exercise.

Opp ¶ 9-12. These assertions and arguments are ineffective and spurious in violation of section 1.52 for reasons given above (and further discussed below as to the clarity of section 1.325). The ALJ does not handle FOIA requests. The PO cited above says correctly that the Commission (apart from the ALJ) decides on FOIA requests including for documents submitted under the PO: the PO and Hearing rule § 1.325 do not and cannot modify a statute, FOIA, and FCC rules to comply with the FOIA statute, and shift determinations of FOIA request to the ALJ as the “Arbiter,” or the like. In addition, it is another straw-man argument to assert that an FOIA request is “a vehicle for challenging confidentiality designations... improper[ly].” A FOIA request does not have to state or have a purpose, and even if it were to make such a “challeng[ing]” nothing in FOIA, FCC rules implementing FOIA, or the PO, make that improper. FOIA is meant to provide a critical level of openness by affording access to government records prior to determinations of whether a particular new request can be granted in full or part, after the agency screens the request under permitted release exemptions. What is improper, it to concoct straw man arguments, and cite to the PO ignoring the relevant language, to assert the sanctity of Maritime’s asserted rights in the Hearing and not cite to the relevant rule §1.325, to cite case authority without even explaining how its holdings apply (e.g. the *US v Kentucky* reference on page 3), and to refer under §7 to an something Maritime “recognizes and acknowledges” in the PO but then not cite what in particular is being referenced and why it support the assertion made (that appears to be since Keller did not want to properly cite what we do above: paragraph 1 of the PO, since it makes the Keller argument spurious, as discussed above). At §11, Keller asserts that “[t]he regulations do not contemplate...” but clear regulations do not allow for contemplation once made and in effect. If they are clear, they must be followed (see below) and

if they are so unclear that they are subject to contemplation and interpretation, then they are impermissibly vague and not legally effective.

In sum, Keller makes straw-man and smoke-screen arguments that mislead from the actual simple rule §1.325, proper PO language reflecting the rule—and divert this Hearing and this FOIA proceeding from proper and timely resolution. He writes of what is proper, what should be policy, etc., but if there is such a problem that needs to be fixed, he can submit a request to change the relevant rule.

- II -

In contrast to the above-cited Hearing rules, including section 1.325, which provides no exception as to Commission records derived in a formal adjudication that would be subject to a FOIA request, the Supreme Court explained that Congress can provide for exceptions in *RENEGOTIATION BOARD v. GRUMMAN AIRCRAFT ENGINEERING CORP.* 421 U.S. 168 (1975):

Congress explicitly exempted the Renegotiation Board from all provisions of the Administrative Procedure Act except for the Public Information Section. 50 U.S.C. App. § 1221. Thus the opinion-writing section of the APA, 5 U.S.C. § 557 - which itself applies only to "adjudication required by statute to be determined on the record after opportunity for an agency hearing" and even then only if the agency decision is not subject to de novo court review, 5 U.S.C. § 554 - is inapplicable to Board decisions.

This Maritime arguments are contrary to the clear language of the rule, and stains to formulate an *ultra vires* rule that contradicts the subject rule. Where a rule is clear, it cannot be subject to contrary "interpretation" and application by the agency. The Supreme explained, *Fogerty v. Fantasy, Inc.*, No. 92-1750, 510 U.S. 517:

Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). When the text of the statute is clear, our interpretive inquiry ends. See *Connecticut Nat. Bank v. Germain*, 503 U.S. , (1992) (slip op., at 5).

And the DC Circuit court found in *AKM v. Secretary of Labor*, 675 F.3d 752:

Because we find this statute to be clear and the agency's interpretation unreasonable in any event, *infra*, we need not and do not decide now that this case presents the same circumstances as *Intermountain* or that deference to agency interpretations of statutes of limitations is warranted as a rule.*** Despite the cloud of dust the Secretary kicks up in an effort to lead us to her interpretation, the text and structure of the Act reveal a quite different and quite clear congressional intent that requires none of the strained inferences she urges upon us.

Agency action amounts to arbitrary and capricious conduct when action contravenes rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in *Vitarelli*." See *Am. Farm Lines v. Black Ball Freight Sew.*, 397 U.S. 532, 538-39 (1970). FOIA rights are among the most fundamental benefits which the FCC has not "bestowed" but is mandated to provide by Congress under FOIA. The Federal Circuit agrees, observing that "[i]t has long been established that government officials must follow their own regulations, even if they were not compelled to have them at all." *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988); see also *Yuni v. Merit Sys. Prot. Bd.*, 784 F.2d 381, 388 (Fed. Cir. 1986) ("The procedures governing federal employment, by statute and regulation, represent a careful balance of employer and employee needs."); *Dodson v. Dep 't of the Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993) ("Although the Secretary was not required to promulgate the . . . regulations, having done so he is bound to follow them."). Other circuits agree. See, e.g., *Leslie v. Att) General of the United States*, 611 F.3d 171, 175 (3d Cir. 2010) (noting "the long-settled principle that rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency"); *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004) ("It is an elemental principle of administrative law that agencies are bound to follow their own regulations."); *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003); *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it

promulgates."); *Gaballah v. Johnson*, 629 F.2d 1191, 1202 (7th Cir. 1980) (recognizing that agency rules governing promotions "confer important procedural benefits upon individuals").

- III -

Opp ¶13. Contrary to Keller's underlying suggestion, the PO does not and cannot modify the FOIA statute or the statute's mandated FCC rules implementing the statute, but instead it accommodated in its first paragraph section 1.325 which in turn properly accommodates the FCC FOIA rules. Further, per Keller, the FOIA requesters lose FOIA rights if they are parties in the Hearing, but there is no basis for that assertion. Anyone could submit the same FOIA requests that are at issue here. Keller speciously attempts to equate a FOIA request with legal counsel access to records designated under the PO: they are not the same, and they do not conflict either, as shown above.

Further, Keller ignores that the matters under this Hearing are not in a closed, non-public proceeding. The Commission properly made this a public hearing. It is solely concerning Maritime's obtaining and use or non-use of CMRS licenses for public service, under public licensing rules and required public disclosures. FOIA is meant to allow anyone to gain access to the records of workings of the government—especially in regarding such public matters as CMRS licensing, disclosures, violations, and the like. FOIA protects information that is subject to restrictions established by Congress and subject to case law.

There is no problem to fix, as Keller strains to concoct for no reason than those which section 1.52 is meant to bar and sanction. Keller effectively argues that a FCC formal Hearing turns what licensing rules require to be public into secrets that only the rule violator (as charged in a Hearing) and the government can know, along with attorneys paid by parties to also keep the secrets. That would turn competitive public licensing and CMRS service into secret affairs contrary to their purpose in the Communications Act and 1996 Telecom Reform Act (generally lessening regulation of CMRS since it is meant to be public, competitive, robust and the like—

not private affairs). In this regard, the PO recognizes in ¶1, cited above, that records released under FOIA release are public. The Keller solution he says would not “unduly prejudice” the requesters (keeping the subject information secret among the attorneys, and at high cost) is not a replacement for release under FOIA which results in public documents. If the information released under FOIA is not all of the information that may be shared among attorneys under the PO, that is not an issue that the subject simple FOIA request even poses. Also, if by granting in full or any part the subject FOIA requests, it is shown that Keller improperly designated documents and information as confidential or highly confidential, that also is not an issue at this time, under the subject FOIA requests, but there appears to be no other reason that Keller strains to concoct a series of spurious arguments in this simple FOIA case.

- IV -

The Opposition opposes the Application for Review at least indirectly as to the exemption-7 issue, and by referencing the Pinnacle Opposition. We discuss this issue below, further to our arguments to date including in our response to Pinnacle.

Conclusions

For reasons given, the Opposition is ineffective and spurious, the Application for Review should be granted, and the requested sanctions should be imposed.

Respectfully submitted, March 7, 2013,

/s/ [Filed electronically.]

Warren Havens, Individual

/s/ [Filed electronically.]

Warren Havens, President of Skybridge Spectrum Foundation

2649 Benvenue Ave., Berkeley, CA 94704. 510-841-2220

Certificate of Service

I, Warren Havens, certify that I have, on March 7, 2013, caused to be served, by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing filing to the following:³

FCC Office of General Counsel
Via email to: joel.kaufman@fcc.gov and david.senzel@fcc.gov

FCC FOIA Officer
Via email to: foia@fcc.gov

Jeffrey L. Sheldon
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
(counsel to Puget Sound Energy)

Robert Keller
Law Offices of Robert J. Keller, P.C.
P.O. Box 33428
Washington, D.C. 20033-04238
(counsel to MCLM)

Matthew J. Plache
Catalano & Plache, PLLC
3221 M Street, NW
Washington, DC 20007
(counsel to Pinnacle Wireless, Inc.)

/s/ [Filed electronically.]

Warren Havens

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