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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MD Docket No. 13-163
	)	
Howard C. Toole	)	File No. BNPH-20070423AAS
	)	
Request for Refund of Application Filing Fee	)	
	)	
	)	

FILED/ACCEPTED

MAY 10 2013

Federal Communications Commission
Office of the Secretary

To: Secretary
Attn: The Commission

APPLICATION FOR REVIEW

Howard C. Toole ("Toole"), acting pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. §1.115, hereby submits this Application for Review of a letter dated March 27, 2013 from the Chief Financial Officer of the FCC's Office of the Managing Director (the "FCC Letter") denying his request for a refund of FCC filing fees paid in connection with a long-form 301 construction permit application filed on April 23, 2007.[1]

Introduction

Toole was the winning bidder in Auction 70 for a new FM station in Plainville, Georgia. On April 2, 2007, the FCC issued a *Public Notice, Auction of FM Broadcast Construction Permits Closes*, 22 FCC Rcd 6323 (2007) ("*Auction Closing Notice*"), in which it stated that winning bidders must submit the appropriate filing fee when filing their long-form 301 construction permit applications. *Id.* at 6327. In order to avoid the forfeiture of his winning bid

[1] This Application for Review is timely filed within 30 days of the public notice date of the FCC Letter as defined in Section 1.4(b) of the Commission's rules. 47 C.F.R. § 1.4(b).

for the Plainville construction permit, Toole filed a timely Form 301 application for the proposed new FM facility on April 23, 2007, and paid the FCC filing fee of $3,210.

On July 19, 2011, Toole filed a request for a refund of his filing fee. In doing so, he pointed out that Section 1.2107(c) of the Commission's rules stated as follows:

> Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, high bidders need *not* submit an additional application fee with their long-form application.

47 C.F.R. §1.2107(c) (emphasis added).

Despite the explicit language in Section 1.2107(c), the FCC Letter noted that in *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, First Report and Order, 13 FCC Rcd 15920, 15984 (1998) ("*Broadcast Auction R&O*"), the Commission stated that application filing fees would apply to long-form applications filed by winning bidders. The FCC Letter also referenced the *Auction Closing Notice* which stated that an application filing fee was to be submitted with their long-form 301 applications. 22 FCC Rcd at 6327. Because Toole paid the FCC filing fee in submitting his long-form construction permit application, the FCC Letter concluded that Toole had "actual and timely knowledge of the requirement that winning bidders in media service auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application." FCC Letter at 2. The FCC Letter also stated that "a party with actual and timely notice of a requirement is bound by its terms," citing *United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978) ("*Mowat*"); and *United States v. Aarons*, 310 F.2d 341, 348 (2nd Cir. 1962) ("*Aarons*").

I. Question Presented for Review.

The FCC Letter denying Toole's requested refund presents the following question for review by the Commission:

> Whether the FCC Letter's conclusion – that Toole had "actual and timely knowledge" that the Commission required winning bidders to submit an application filing fee with their long-form 301 applications – is relevant, given that, at the time Toole filed his long-form 301 application, the only FCC rule governing this matter stated that, "[n]otwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application fee with their long-form application." 47 C.F.R. § 1.2107(c) (2007).

II. Legal Requirements.

It is well established that an agency must adhere to its own rules and regulations. *See, e.g., Reuters Limited v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) ("*Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, . . . for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action"), *citing Teleprompter Cable Systems v. FCC*, 543 F.2d 1379, 1387 (D.C. Cir. 1976). As stated above, at the time Toole filed his Form 301 application and submitted his accompanying filing fee, Section 1.2107(c) of the Commission's rules unambiguously stated that, "[n]otwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary," winning bidders were not required to submit an application fee with their long-form application. 47 C.F.R. § 1.2107(c). The FCC Letter denying his refund request is inconsistent with Section 1.2107(c) as it existed at the time Toole filed his Form 301 application, and, therefore, the FCC Letter contravenes the Commission's statutory obligation to comply with its own rules and regulations.

III. Denial of Requested Refund Must Be Reversed.

The Commission's 89-page order in which it adopted rules to govern broadcast auctions contains the following statement: "The statutorily established application fees will apply to the long-form applications filed by winning auction bidders." *Broadcast Auction R&O*, 13 FCC Rcd at 15984. The preceding sentence is the only statement in the entire *Broadcast Auction R&O* in

which the Commission addressed long-form application filing fees. Moreover, although the Commission referenced the general fee provision in a footnote, it failed to (i) address Section 1.2107(c) of the rules, (ii) provide any explanation of how its statement that filing fees were to be submitted by winning bidders could be reconciled with the Commission's existing rule provision governing this specific matter, or (iii) modify Section 1.2107(c) of the rules. Thus, the isolated sentence in the *Broadcast Auction R&O* in which the Commission indicated that winning bidders would be required to pay filing fees is nothing more than dictum. This is especially true given that the statement did not appear in the summary of the *Broadcast Auction R&O* which was published in the Federal Register on September 11, 1998. *See* 78 *Fed. Reg.* 18527 (March 27, 2013).

The analysis provided in the FCC Letter is conclusory and unavailing. The FCC Letter states that Toole paid the FCC filing fee at the appropriate time and in the correct amount, and therefore concludes that Toole had "actual and timely knowledge" of the requirement that winning bidders were required to pay the filing fee. However, in requiring winning bidders to pay a filing fee in submitting their long-form 301 applications, the *Auction Closing Notice* indicated that the winning bidders would forfeit their winning auction bids if the filing fee was not paid. Given the limited amount of time between the issuance of the *Auction Closing Notice* on April 2, 2007, and the deadline for submitting long-form applications (May 2, 2007), winning bidders had no choice but to pay the filing fee in submitting their long-form 301 applications.[2]

The FCC Letter also mischaracterized the basis for Toole's refund request. The conclusory assertion in the FCC Letter that Toole had "actual and timely knowledge" that

[2] Toole's compliance with the fee requirement contained in the *Auction Closing Notice* in order to avoid forfeiting his winning auction bid does not constitute a waiver of his right to challenge a requirement in contravention of Section 1.2107(c) of the Commission's rules. The Commission requires compliance with its rules while a challenge to the lawfulness of a rule is pending. *See, e.g.*, 47 U.S.C. § 405(a) (petition for reconsideration shall not "excuse any person from complying with or obeying any order, decision, report, or action of the Commission . . . .").

winning bidders were required to pay the application filing fee demonstrates that the Commission has misconstrued Toole's refund request in an effort to have it fall neatly within the *Mowat/Aarons*' principle that lack of Federal Register publication does not affect persons having actual and timely notice of the terms of the regulation. In this case, however, Toole has never contended that he was unaware of the *Auction Closing Notice* or its requirement that winning bidders pay a filing fee with their long-form application. On the contrary, Toole's refund request is based on Section 1.2107(c) of the rules which unequivocally stated that, regardless of any other provision in the Commission's rules, winning bidders were not required to submit filing fees with their long-form applications.[3]

The Commission itself recognized the inconsistency between the isolated sentence in the *Broadcast Auction R&O* and Section 1.2107(c), and therefore commenced a rulemaking proceeding to modify Section 1.2107(c) of the rules. Specifically, in March 2011 – more than 12½ years after the *Broadcast Auction R&O* was released – the FCC initiated a proceeding in an effort to clarify its rules regarding the payment of filing fees by winning auction bidders in the broadcast services in conjunction with long-form applications. *See Amendment of the Schedule of Application Fees Set Forth In Sections 1.1102 through 1.1109 of the Commission's Rules*, Order and Notice of Proposed Rulemaking, 26 FCC Rcd 2511 (2011). The Commission noted its statement in the *Broadcast Auction R&O* requiring the payment of a filing fee when a long-form application is filed. *Id.* at 2512. The Commission also acknowledged, however, the explicit language in Section 1.2107(c) of its rules providing that: "Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, high bidders need not

[3] The FCC Letter fails to recognize that, as a result of the Commission's failure to provide timely Federal Register notice of the statement in the 1998 *Broadcast Auction R&O* indicating that winning bidders were required to pay filing fees when submitting a long-form 301 application, Toole (as well as all other winning bidders) was deprived of the opportunity to challenge the adoption of that requirement.

submit an additional application filing fee with their long-form applications." *Id.*, citing 47 C.F.R. § 1.2107(c). Accordingly, the Commission stated the following:

> To resolve any inconsistency and to conform Section 1.2107(c) to the Commission's determination in the [*Broadcast Auction R&O*] as reflected in Section 1.1104, we propose to amend Section 1.2107(c) by revising the cited sentence to read as follows: "Except as otherwise provided in Section 1.1104 of the rules, high bidders need not submit an additional application fee with their long-form applications."

26 FCC Rcd at 2512.

In June 2011, the Commission adopted its proposal and revised Section 1.2107(c) of the Commission's rules to include the above proviso making specific reference to Section 1.1104, the fee section of the rules. *Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1109 of the Commission's Rules*, Second Order, 26 FCC Rcd 9055 (2011) ("Second Order"). Thus, prior to June 2011, there was no Commission *rule* which even suggested that a winning bidder in an auction was required to submit a filing fee with a long-form construction permit application. The above-referenced rulemaking proceeding in GEN Docket No. 86-285 establishes that the Commission was well aware that its 1998 *Broadcast Auction R&O* failed to modify the Commission's existing rule with respect to whether winning bidders were required to pay filing fees with long-form 301 applications.

Although the FCC Letter relies on *Mowat* and *Aarons* to support its denial of Toole's refund request, those cases are distinguishable on their facts from those in this proceeding. In each of those cases, there was no dispute that the new rule had been validly adopted. Although the rule had not been published in the Federal Register, the parties in *Mowat* and *Aarons* had actual and timely notice of the new rule and therefore they were held accountable for their failure to comply with the new rule.

Unlike the circumstances in *Mowat* and *Aarons*, which were both criminal proceedings, in this case there was an existing Commission rule which governed the specific subject matter.

Section 1.2107(c) of the Commission's rules unequivocally stated that the submission of application filing fees by a winning auction bidder was not required, *notwithstanding any other Commission rule*. Moreover, unlike in *Mowat* and *Aarons*, the Commission did not adopt a new "rule" in its 1998 *Broadcast Auction R&O*, and failed to modify its existing rule until nearly 13 years later, in June 2011, when the FCC sought to resolve the "inconsistency" between a single sentence in the 89-page *Broadcast Auction R&O* and Section 1.2107(c) of the rules. *Second Order*, 26 FCC Rcd 9055 (2011).

Recognizing that the statement in the 1998 *Broadcast Auction R&O* had never been formally adopted and had not become effective, the Commission went one step further and published a corrective summary in the Federal Register on March 27, 2013, the same day the FCC Letter was released. In attempting to correct its omission 15 years later, the Commission stated that the correction was being issued to address its prior omission regarding the statement in the *Broadcast Auction R&O* concerning application filing fees and "remedy any confusion resulting from it." 78 *Fed. Reg.* 18527 (March 27, 2013). It should be emphasized that although the FCC Letter is based on Toole's "actual and timely knowledge" that winning bidders were required to submit a filing fee with their long-form 301 applications, which, in turn, is based on the 1998 *Broadcast Auction R&O*, the FCC Letter fails to make any reference to either (i) GEN Docket No. 86-285, in which the Commission resolved the inconsistency in June 2011 between the statement in the *Broadcast Auction R&O* requiring the payment of filing fees with the submission of 301 long-form applications, and Section 1.2107(c) of the Commission's rules, or (ii) the Commission's attempt to cure its previously defective notice by publishing a curative summary of the *Broadcast Auction R&O* in the Federal Register on March 27, 2013, 15 years after that *R&O* was released. The omission of the Commission's efforts to modify Section 1.2107(c) of the rules to resolve the inconsistency regarding a winning bidder's obligation to pay

a filing fee in submitting a long-form 301 application significantly undermines the FCC Letter's reliance on the 1998 *Broadcast Auction R&O* to support the denial of the refund request.

Conclusion

As demonstrated herein, the unambiguous language in Section 1.2107(c) of the Commission's rules makes abundantly clear that Toole was not required to submit a filing fee with his long-form application, and the Commission did not modify that rule provision until nearly 13 years after the *Broadcast Auction R&O* was released and long after Toole had filed his long-form 301 application. Moreover, the FCC's effort to publish a corrective summary in the Federal Register on March 27, 2013 serves only to demonstrate that the Commission continues to recognize that the statement in the 1998 *Broadcast Auction R&O* requiring winning bidders in broadcast auctions to pay filing fees when submitting a long-form 301 application was not formally adopted in a manner prescribed by Section 552 of the Administrative Procedure Act. Therefore, the FCC Letter should be reversed and Toole's request for a refund of the filing fee that was paid with his long-form 301 application should be expeditiously granted.

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that Toole's Application for Review be expeditiously granted.

Respectfully submitted,

PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037-1122
Tele: (202) 663-8184
Email: lew.paper@pillsburylaw.com

Attorneys for
Howard C. Toole

By: Andrew Kersting
Lewis J. Paper
Andrew S. Kersting

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2013, a copy of the foregoing Application for Review was hand delivered to the following:

Honorable Julius Genachowski
Federal Communications Commission
Room 8-B201
445 12th Street, SW
Washington, DC 20554

Honorable Robert M. McDowell
Federal Communications Commission
Room 8-C302
445 12th Street, SW
Washington, DC 20554

Honorable Mignon Clyburn
Federal Communications Commission
Room 8-A302
445 12th Street, SW
Washington, DC 20554

Honorable Jessica Rosenworcel
Federal Communications Commission
Room 8-A204
445 12th Street, SW
Washington, DC 20554

Honorable Ajit Pai
Federal Communications Commission
Room 8-C302
445 12th Street, SW
Washington, DC 20554

Cherie Mills

Cherie Mills

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