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FILED/ACCEPTED

Before the
FEDERAL COMMUNICATIONS COMMISSION MAY 13 2013
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of	)	MD Docket No. 13-163
	)	
VIRTUES COMMUNICATIONS NETWORK, LLC	)	File No. BNPH-20110630AJB File No. BNPH-20110630AJD
	)	
Request for Refund of Application Filing Fees	)	

TO: The Secretary
ATTN: The Commission

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APPLICATION FOR REVIEW

Virtues Communications Network, LLC ("VCN"), by counsel and pursuant to §1.115 of the Commission's rules, hereby respectfully requests that the Commission review and vacate a Letter Decision dated March 27, 2013 from the Commission's Chief Financial Officer ("CFO") in the Office of the Managing Director.[1] In the Letter Decision, the CFO denied VCN's request for the refund of filing fees it paid in connection with the long-form applications for FM construction permits at Twentynine Palms, California, and Hanapepe, Hawaii, for both of which VCN was the winning bidder in Auction 91. A copy of the Letter Decision is attached.

[1] Public notice of the CFO's action was released by the Commission on April 11, 2013 in *Fee Decisions of the Managing Director Available to the Public,* Public Notice, DA 13-679 (OMD, rel. April 11, 2013). The 30-day period for submitting an application for review of this action expired on May 11, 2013 – which was a Saturday. This pleading is filed on the first business day thereafter, and therefore is timely filed.

Question Presented for Review

Is the winning bidder in an auction for broadcast permits entitled to a refund of the application filing fees it paid in connection with filing its post-auction long-form application in view of the fact that the version of §1.2107(c) of the Commission's rules in effect at the time of the auction stated that "high bidders need not submit an additional application filing fee with their long-form applications"?

Factor Warranting Commission Consideration

The CFO's denial of VCN's requested refund is contrary to the provisions of the version of §1.2107(c) of the FCC's rules in effect at the time of the auction.

Discussion

VCN was an active participant in Auction 91, an auction for broadcast FM construction permits. The Commission named VCN the high bidder for two such FM permits at Twentynine Palms, California, and Hanapepe, Hawaii in a Public Notice released on May 23, 2011.[2] Winning bidders were directed to submit the down payments on the purchased permit by June 7, 2011; to submit the final installment of the purchase price by June 21, 2011; and to file their long-form applications by June 30, 2011. Applicants were "encouraged to pay the FCC Form 301 application filing fee electronically . . ."[3] VCN duly paid the application filing fees for both of its long-form applications when they were filed on June 30, 2011. VCN paid the fees at that time in order to ensure that the applications would be accepted for filing. The fee paid for each

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[2] *Auction of FM Broadcast Construction Permits Closes, Winning Bidders Announced for Auction 91,* Public Notice, 26 FCC Rcd 7541, 7552, 7553 (2011).

[3] *Ibid.*, at ¶26.

application was $3,485.00 – a total of $6,970.00 for both applications. However, upon further reflection since that time, VCN has concluded that the Commission's effort to collect those fees ran contrary to its own rules and that the fees should be refunded. On September 27, 2011, VCN requested the refund those fees. The Letter Decision is the Commission's response to that request.

At the time that Auction 91 was conducted, §1.2107(c) of the Commission's rules read 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 filing fee with their long-form applications.

This regulatory provision was the basis for VCN's refund request. In the Letter Decision, the CFO acknowledged the existence of §1.2107(c), but asserted that it had been modified by the Commission in a 1998 rulemaking proceeding in MM Docket No. 97-234 that established procedures for broadcast auctions.[4] At ¶164 in the *First Report and Order* in that docket, the Commission stated that "The statutorily established application fees will apply to the long-form applications filed by winning bidders."

Although it made this declaration in that *First Report and Order* in 1998, no where in that order did the Commission actually amend the language of §1.2107(c) itself. That section, precisely as quoted above, remained in the rulebook and in effect until June 28, 2011.[5] An agency's rule encoded in the Federal Code of Regulations automatically trumps any

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[4] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15984-85 (1998).

[5] *See, infra,* at p. 5.

pronouncements that the agency may make short of amending or rescinding the rule itself. In this case, even if the Commission had adopted another rule specifically to address the question of whether broadcast applicants should pay filing fees, that rule would have been secondary to §1.2107(c). The language of §1.2107(c) explicitly mandates its own priority over any other provisions in the Commission's rules. Thus the Commission's comment in the *First Report and Order* that winning bidders in broadcast auctions should pay filing fees, absent actually amending the rule, has no regulatory effect and cannot lead to any legitimate enforcement effort.

The Commission acknowledged this discrepancy between its remarks in the *First Report and Order* and the actual regulation in 2011 by proposing to amend §1.2107(c) in a *Notice of Proposed Rulemaking* in Docket 86-285:

> [W]e seek to clarify the rules on the payment of filing fees by winning bidders in auctions of construction permits in the broadcast services in conjunction with their long-form applications. . . . To resolve any inconsistency and to conform Section 1.2107(c) to the Commission's determination in the *Broadcast Competitive Bidding First Report and Order* . . . 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."[6]

The amendment was adopted by the Commission in the *Second Order* in this docket, released on June 20, 2011.[7] Section 1.1104 of the rules contains the schedule of application filing fees for the broadcast services. This amendment finally makes it clear that the application fees for broadcast long-form applications specified in §1.1104 do in fact pertain to winning bidders in broadcast

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[6] *In the Matter of 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, 2512 (2011).

[7] *In the Matter of 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).

auctions. The *Second Order* directed that the amended rule should become effective as of the day of publication in the Federal Register. It was published in the Federal Register on June 28, 2011.[8]

As noted above, the Commission published its Public Notice of the winners and the long-form filing procedures for Auction 91 on May 23, 2011. The new amended version of §1.2107(c) was not then yet in effect. The old version, still then in effect, exempted broadcast auction high bidders from the requirement to pay filing fee with their long-form applications. The deadline for filing Auction 91 long-form applications was set for June 30, 2011. Applicants who filed their long-form applications prior to June 28, 2011, were clearly operating entirely under the old version of §1.2107(c). VCN filed its applications on June 30. Nonetheless, the new version of §1.2107(c) could not apply to VCN's applications filed on June 30 because it was not adopted and did not become effective until after the close of Auction 91 and the winning bidders were named. To rule otherwise would allow the anomalous circumstance under which some Auction 91 winners would have to pay a filing fee while others would be exempt. It is axiomatic that the Commission must treat similarly situated applicants in a similar manner.[9]

The CFO closes the Letter Decision with the remark that the fact that VCN paid the filing fees demonstrated that VCN "had actual and timely knowledge of the requirement that winning bidders in media service auctions must pay the prescribed fee . . ."[10] This is a speculative and unfounded conclusion. VCN paid the fees to facilitate the immediate processing of the applications without controversy. That VCN paid the fees does not lead to any conclusion about

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[8] 76 Fed. Reg. 37660 (June 28, 2011).

[9] *See Melody Music, Inc. v. FCC,* 345 F.2d 730 (D.C.Cir. 1965).

[10] Letter Decision, at 2.

VCN's knowledge of or belief in the legitimacy of the rule. In any event, the point is irrelevant because VCN did not request refunds on the basis that it was ignorant of the fee rules.

In summary, VCN respectfully urges the Commission to reverse the CFO's denial of the request for a refund of $6,970.00 that it paid to the Commision in improperly collected filing fees. The provisions of §1.2107(c) in effect during Auction 91 exempted from the filing fee requirement.

Respectfully submitted

VIRTUES COMMUNICATIONS
NETWORK, LLC

By: Donald E. Martin

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May 13, 2013

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Maurice Vargas
Virtues Communications Network LLC
Post Office Box 215
Kings Park, NY 11754

Re: Virtues Communications Network LLC
File No. BNPH-20110630AJB
BNPH-20110630AJD
FRN 0020560488

Dear Mr. Vargas:

This responds to your September 27, 2011 request for refund of application fees totaling $6,970.00 paid by Virtues Communications Network LLC (Virtues) in conjunction with the filing of a long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 91. For the reasons stated below, payment of the fees was correct and no refund is warranted.

You contend that no filing fees were required pursuant to section 1.2107(c) of the rules, which states that high bidders in spectrum auctions need not submit an additional application fee notwithstanding any other provision of our rules. Section 1.2107(c) is one of the uniform competitive bidding rules that the Commission adopted in 1997 for non-broadcast spectrum auctions. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 97-82 and ET Docket No. 94-32*, 13 FCC Rcd 374 (1997) (*Third Report and Order*). The Commission stated that the rules adopted in the *Third Report and Order* would apply to all auctionable services, unless the Commission determined that with regard to particular matters the adoption of service-specific rules was warranted. *Id.* at 382.

The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *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, 15923 (1998) ("*Broadcast Auction Report and Order*"). At paragraph 164 of the *Broadcast Auction Report and Order* the Commission stated that winning bidders' Form 301 applications should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice, and specifically stated that the statutorily established application fees would apply to the long-form applications filed by winning bidders. *Id.* at 15984.

The Public Notice issued after the close of Auction 91 directed all winning bidders to electronically file Form 301 through the Media Bureau's Consolidated Database System (CDBS) no later than June 30,

2011, and encouraged applicants to pay the FCC Form 301 application filing fee electronically using the CDBS filing system. *Auction of FM Broadcast Construction Permits Closes*, 26 FCC Rcd 7541, 7546 (2011) (*Auction 91 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 91 Closing Notice*, Virtues paid the fees at the prescribed time and in the correct amount. This demonstrates that Virtues 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. A party with actual and timely notice of a requirement is bound by its terms. *See United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978); *United States v. Aarons*, 310 F.2d 341, 348 (2nd Cir. 1962).

For these reasons your request for refund of the application fees is denied.

Sincerely,

Mark Stephens
Chief Financial Officer