

#15170

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

APR 29 2013

Federal Communications Commission  
Office of the Secretary

In the Matter of

College Creek Broadcasting, Inc.  
FRN 0011304029

- ) MD Docket No. 13-163
- ) File No. BNPH-20041223ACA
- ) BNPH-20041223ABR
- ) BNPH-20041223ACB
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- ) BNPH-20041228AAB
- ) BNPH-20041228ABD
- ) BNPH-20041228ABK
- ) BNPH-20041229ACC
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- ) BNPH-20050103AAA
- ) BNPH-20050103AAB
- ) BNPH-20050103AFI
- ) BNPH-20050103AAC
- ) BNPH-20050103AAD
- ) BNPH-20050103AIK

COPY

To: Office of the Secretary  
Attn: The Commission

**APPLICATION FOR REVIEW**

Shainis & Peltzman, Chartered  
1850 M Street, NW  
Suite 240  
Washington, D.C. 20036  
(202) 293-0011

April 29, 2013

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## SUMMARY

The Federal Communications Commission is obligated to refund the application fees paid by College Creek Broadcasting, Inc. relative to its winning bids in Auction No. 37. The collection of the fees was improper as clearly articulated in Section 1.2107(c) of the Commission's rules.

The March 27, 2013 Letter Ruling denying College Creek's refund request relies on a March 27, 2013 agency action which blatantly rewrites the rules so that the Managing Director's ruling could be "supported." Such actions are clearly improper and are disingenuous. The Commission must intervene to stop this outrageous action.

College Creek Broadcasting, Inc., (“College Creek”) by its attorneys and pursuant to Sections 1.104 and 1.115 of the Commission’s rules seeks Commission review of the March 27, 2013 letter ruling (“Letter Ruling”) from the Office of the Managing Director.<sup>1</sup> That Letter Ruling denied the July 19, 2011 Request for refund of application fees totaling \$108,870 paid by College Creek in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 37.<sup>2</sup> In support, College Creek submits the following:

**I. Preliminary Statement**

As will be demonstrated, the Letter Ruling is legally wrong. In this regard, College Creek in its request pointed out that the imposition of fees was improper as the fees were collected pursuant to Subsection (c) of Section 1.2107 of the Commission’s rules. The subsection provided the following:

“Notwithstanding any other provision in [the Commission’s rules] to the contrary, high bidders need not submit an additional filing form with their long-form application.”

The rule was operative from 1994 until June 28, 2011 that successful bidders would not have to file application fees with their long-form applications.

In denying the request, the Letter Ruling stated, *inter alia*, the following:

“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*

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<sup>1</sup> The letter was signed by the Chief Financial Officer. A copy of the letter is attached (Attachment A).

<sup>2</sup> A copy of the College Creek refund request is attached (Attachment B). The Letter Ruling appeared on Public Notice on April 11, 2013 (Attachment C).

*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, 25923 (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 37 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order. Auction of FM Broadcast Construction Permits Closes, 20 FCC Rcd 1021, 1025 (2004) (Auction 37 Closing Notice).* In compliance with the *Broadcast Auction Report and Order* and the *Auction 37 Closing Notice*, College Creek paid the fees at the prescribed time and in the correct amounts. This demonstrates that College Creek 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 (9<sup>th</sup> Cir. 1978); United States v. Aarons, 310 F.2d 341, 348 (2<sup>nd</sup> Cir. 1962).*

## II. Background

Since the late 1990s, the FCC has issued initial construction permits for new broadcast stations pursuant to an auction process. *Implementation of Section 309(j) of the Communications Act*, 13 FCC Rcd 15920 (1998) (“1998 R&O”). To participate in a broadcast auction, prospective applicants are required to file a “short form” application which provides minimal information about themselves and the particular permit(s) on which they wish to bid. Once the auction has been completed, the successful bidder for any permit is then required to submit a “long-form” application providing more extensive and detailed information.

Before the adoption of auction processes, broadcast applicants were required to submit only a single “long-form” application which had to be accompanied by a filing fee. As of the initiation of auctions for broadcast permits, however, the FCC’s rules had specifically and unequivocally eliminated the long-form application filing fee requirement for successful bidders: *See* Section 1.2107(c) of the Commission’s rules. That rule, which had been adopted by the Commission when spectrum auctions were first implemented in *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2348 (1994), remained in place, unchanged, until 2011. (The circumstances of the 2011 revision are discussed below).

While that rule was in effect between 2000 and 2011, the Commission conducted 11 broadcast auctions, with successful bids placed on a total of 650 construction permits.<sup>3</sup> Despite Section 1.2107(c)’s clear bar against the imposition of long-form application fees, at the conclusion of each of those auctions the FCC announced that successful bidders would have to submit application fees with their long-form applications.<sup>4</sup> In response to the Commission’s

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<sup>3</sup> The auctions in question were denominated Auctions Nos. 37, 62, 64, 68, 70, 79, 80, 81, 88, 90 and 91.

<sup>4</sup> The public notices containing those announcements may be found at the following citations. The pinpoint page citations direct the reader to the pages in each notice where the FCC mandated submission of application fees and/or referenced its “red light” policy. *FM Broadcast Construction Permits Auction Closes*, 20 FCC Rcd 1021, 1026

instructions, College Creek submitted long-form application fees in the aggregate amount of \$108,870.00.

In October, 2009, a successful bidder in Auction No. 79, having paid the application fee unlawfully demanded by the Commission, sought a refund of that fee. Simply citing Section 1.2107(c), the refund request observed that an agency is bound by its own rules unless and until those rules are changed. A copy of the refund request is included as Attachment D hereto. In March, 2011, that request was effectively granted when the FCC sent that successful bidder a check in the full amount of the application fee that had been paid. To the best of College Creek's knowledge, no explanatory letter, order or other document accompanied the check; however, a notation on the check stub stated "not required to pay fees." A copy of the check (with its stub) is included as Attachment E hereto.

College Creek thereupon submitted its request for refund of the fees which it had paid in connection with its long-form applications.

### III. Discussion

It is axiomatic that an agency is bound to follow its own regulations. *E.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1957); *Reuters v. Fcc*, 781 F.2d 946 (D.C. Cir 1986) (calling the *Accardi* doctrine a "precept which lies at the foundation of the modern

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(2004) (Auction No. 37); *Auction of FM Broadcast Construction Permits Closes*, 21 FCC Rcd 1071, 1076, 1077 (2006) (Auction No. 62); *Auction of Full Power Television Construction Permits Closes*, 21 FCC Rcd 3010, 3014, 3015 (2006) (Auction No. 64); *Auction of FM Broadcast Construction Permits Closes*, 22 FCC Rcd 518, 523 (2007) (Auction No. 68); *Auction of FM Broadcast Construction Permits Closes*, 22 FCC Rcd 6323, 6327, 6328 (2007) (Auction No. 70); *Auction of FM Broadcast Construction Permits Closes*, 24 FCC Rcd 11903, 11908, 11910 (2009) (Auction No. 79); *Blanco, Texas Broadcast Auction No. 80 Closes*, FCC Rcd 12793, 12796 (2000) (Auction No. 80); *Auction of Low Power Television Construction Permits Closes*, 20 FCC Rcd 15322, 15327, 15328 (2005) (Auction No. 81); *Closed Auction of Broadcast Construction Permits Closes*, 25 FCC Rcd 10071, 10076, 10078 (2010) (Auction No. 88); *Auction of VHF Commercial VHF Television Station Construction Permits Closes*, 26 FCC Rcd 1916, 1920, 1922 (2011) (Auction No. 90); *Auction of FM Broadcast Construction Permits Closes*, 26 FCC Rcd 7541, 7546, 7548 (2011) (Auction No. 91).

administrative state...”).<sup>5</sup> Here, Section 1.2107(c) of the FCC’s rules unequivocally provided that no application fees would be required of successful bidders in connection with their long-form applications. And yet, successful bidders - including College Creek - in 11 auctions spanning an 11-year period *were* required to pay such fees.

The Commission’s public notices instructing successful bidders about their post-auctions obligations all made clear that payment of the application fees was mandatory. *See* Note 4, *supra*.<sup>6</sup> The public notices afforded no alternative to successful bidders, who had just committed through the auction process to pay thousands (or hundreds of thousands, or more) of dollars for the underlying permits: payment of the long-form application fee was required.

Not surprisingly, the notices made no reference to Section 1.2107(c).

The Commission’s insistence that such fees be paid was unquestionably contrary to Section 1.2107(c). The collection of those fees was therefore unlawful, as is the agency’s continued retention of those fees. Section 1.1115(a)(1) of the FCC’s rules specifically provides that application fees “will be” refunded when no fee is required for the application.

Underscoring the unlawfulness of the Commission’s position is the fact that, nearly two years ago, a refund request was granted because (according to the notation on the FCC’s check) that refund requester - who was in precisely the same position as College Creek - was “not required to pay fees.” *E.G., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

Additional background information relative to Section 1.2107(c) may shed useful light on the FCC’s odd (and unlawful) intransigence.

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<sup>5</sup> *See also, e.g., Bhd. Of Ry. Carmen Div., Transp. Communs. Int’l Union v. Pena*, 64 F.3d 702, 703 (D.C. Cir 1995) (referencing “the general principle that federal agencies must comply with their own rules”); *U.S. v. Heffner*, 420 F.2d 809, 811 (4<sup>th</sup> Cir. 1969) (“An agency of the government must scrupulously observe rules, regulations, or procedures which it has established”).

<sup>6</sup> Most of these notices even included ominous reminders that non-payment, or even late payment, would trigger the FCC’s draconian “red-light” rules. *See* Note 4, *supra*. The “red light” rules could result not only in dismissal of the application in question, but also in deferral or dismissal of other applications that the non-/late-payer might have pending. *See Amendment of Parts 0 and 1 of the Commission’s Rules*, 19 FCC Rcd 6540 (2004).

When the Commission expanded its spectrum auction program to include broadcast authorizations in 1998, the agency indicated in the body of the Report and Order announcing that expansion that it planned to require long-form application fees of successful bidders for broadcast permits. *1998 R&O*, 13 FCC Rcd at 15984, ¶ 164. But in so doing, the FCC either neglected to notice, or forgot, or chose to disregard, the fact that Section 1.2107(c) of its rules already explicitly precluded the collection of such fees. To be sure, the Commission could - then, or at any time since then - have undertaken a rulemaking to amend Section 1.2107(c) to permit such fee collections. But the fact of the matter is that the Commission did *not* amend that rule until June, 2011. Having failed to amend Section 1.2107(c) in the interim, the Commission was bound to follow it during that time<sup>7</sup>, and its collections of auction-based long-form applications fees from 2004-2011 were thus impermissible.

The Commission finally decided to amend its rules in this regard in 2011.<sup>8</sup> But in so doing, the agency appears to have sought disingenuously to create the erroneous impression that Section 1.2107(c) had not up to that time clearly precluded collection of long-form application fees from successful bidders.

In early March, 2011, the Commission released an “Order and Notice of Proposed Rulemaking,” 26 FCC Rcd 2511 (2011) (“*2011 NPRM*”), in which it first announced routine adjustments to its fee schedules, and then proposed to “clarify” its rules, as follows:

[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. In [*the 1998 R&O*], the

<sup>7</sup> See, e.g., *Center for Auto Safety v. Dole*, 828 F.2d 799, 803 (D.C. Cir. 1987) (“the Supreme Court has told us that ‘so long as [an administrative] regulation is extant it has the force of law,’ *United States v. Nixon*, 418 U.S. 683, 695, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)”).

<sup>8</sup> The June, 2011 amendment of Section 1.2107(c) is the subject of several petitions for reconsideration which are currently pending. The disposition of those petitions should have no effect on the instant submission, since the rulemaking will have only prospective effect, while the instant submission seeks redress for agency misconduct prior to June, 2011.

Commission required the filing of application fees in such cases, and Section 1.1104, the Schedule of Charges for Media Bureau Service filings, requires the payment of a fee when the long-form application is filed. [footnote omitted] However, Section 1.2107(c) of the rules provides with regard to the filing of long-form applications by winning bidders in auctions that, “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.” [footnote omitted] To resolve any inconsistency in the Broadcast Competitive Bidding First Report and Order 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.”

2011 NPRM, 26 FCC Rcd at 2512. With all due respect, the Commission’s proposed “clarification” reflects at best disingenuousness and, at worse, a bad faith effort to mask the fact that for 11 years the Commission had repeatedly violated its own rules.

Why was the Commission’s March, 2011 proposal disingenuous?

First, to characterize the proposed change as a “clarify[ication]” stretches the notion of clarification beyond recognition. Section 1.2107(c) needed no clarification - it was unmistakably clear. It provided that, “notwithstanding any other provision” of the Commission’s rules, long-form application fees would *not* be required of successful auction bidders. The fact, then, that another section of the rules (*i.e.*, Section 1.1104) might have been read to suggest that some such fees were required was completely immaterial, thanks to the “notwithstanding” clause in Section 1.2107(c).<sup>9</sup>

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<sup>9</sup> The FCC’s suggestion that Section 1.1104 might have muddled the meaning of Section 1.2107(c) is in any event far-fetched. Section 1.1104, to which the FCC referred in the 2011 NPRM, is simply the fee schedule for broadcast applications. It does not contain any specific reference to “auction-related” applications. However, since long-form applications filed by successful bidders are filed on the same FCC forms as other, non-auction-related applications, the Commission seems to suggest that Section 1.1104 should be read to say that all fees in that section applied equally to auction-related and non-auction-related applicants. That suggestion might be valid but for the fact that

While Section 1.1104 did not itself expressly contradict Section 1.2107(c), dictum in the *1998 R&O* did. In the *1998 R&O* the FCC indicated its intent to impose fees on the long-form applicants of successful bidders. 13 FCC Rcd at 15984. That language clearly reflected an intent directly contrary to the explicit terms of Section 1.2107(c). But an agency's expressions of intent buried in a report cannot override the direction of explicit rules which the agency has properly adopted. See Footnote 5, *supra*.<sup>10</sup> And as to the rules, there was absolutely no need for "clarification": Section 1.2107(c) was clear.

The disingenuous nature of the Commission's wording was particularly aggravated when the Commission said in the *2011 NPRM* that its goal was to "resolve any inconsistency." "Any" inconsistency? That suggests that there might not have been an inconsistency. But there obviously *was* a dramatic inconsistency between the agency's intent articulated in the *1998 R&O* and the express terms of Section 1.2107(c). To imply, as the Commission did in the *2011 NPRM*, that there might not have been any inconsistency is absurd.

The FCC's less-than-forthright approach to this situation was further aggravated with the release of *Amendment of the Schedule of Application Fees Set Forth In Sections 1.1102 through 1.1109 of the Commission's Rules*, 26 FCC Rcd 9055 (2011) ("*Second Order*"), in which it adopted the rule revision it had proposed in the *2011 NPRM*. In the *Second Order*, the Commission mischaracterized Section 1.2107(c) as "*suggest[ing]* that a filing fee need not accompany a high bidder's long-form application." *Second Order*, 26 FCC Rcd at 9055 (emphasis added). Again with all due respect to the Managing Director, the mandate of Section

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Section 1.2107(c) explicitly exempted successful auction participants from any long-form application fee requirement, and did so "notwithstanding any other provision" of the Commission's rules.

<sup>10</sup> It may also be noted that, in the Notice of Proposed Rulemaking which preceded the *1998 R&O*, the FCC made no reference at all to Section 1.2107, much less to the notion that the agency might be considering a radical change to that section. *Implementation of Section 309(j) of the Communications Act*, 13 FCC Rcd 22363 (1997). So the dictum the Commission inserted into the *1998 R&O* cannot be deemed to have properly arisen through some aspect of the rulemaking process.

1.2107(c) - which by its own express terms overrode all other provisions of the Commission's rules - was far more than a "suggest[ion]."

In the *Second Order* the Commission revised Section 1.2107(c) in relevant part to read

[e]xcept as otherwise provided in § 1.1104, high bidders need not submit an additional application filing fee with their long-form applications.

*Second Order*, 26 FCC Rcd at 9057. The effect of this change was to perform a 180° reversal from the previous language of Section 1.2107(c). But in characterizing the change, the Commission said

[b]y amending Section 1.2107(c), we clarify that *high bidders must still* pay any fees required by Section 1.1104 when filing their post-auction long-form application.

*Second Order*, 26 FCC Rcd at 9055 (emphasis added). By using the word "still," the Commission inaccurately implied that successful auction bidders had previously been "required" to pay long-form application fees. That had not been the case, as the previous language of Section 1.2107(c) made abundantly clear.

The agency's sleight of hand effort to reinvent the historical record was further evident in the *Second Order*, where the Commission asserted that Section 1.2107(c) is a

rule of agency procedure that does not substantially affect the rights or obligations of non-agency parties.

*Second Order*, 26 FCC Rcd at 9056. As far as College Creek is aware, a rule which imposes payment obligations on regulatees would not ordinarily be viewed as involving merely "agency procedure."<sup>11</sup>

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<sup>11</sup> The notion that Section 1.2107(c) constitutes merely "a rule of agency procedure" is further belied by the FCC's own actions. If mere "agency procedure" were truly at issue here, the Commission could - and presumably would - have amended Section 1.2107(c) summarily, without undertaking the steps required (by the Administrative

Moreover, the former version of the rule expressly relieved successful bidders of the obligation to pay long-form application fees, while the revised version imposes precisely such an obligation. How could the FCC claim that the rule change did not “substantially affect the rights and obligations of non-agency parties?”

In short, the FCC, in 1998, may have wanted to impose long-form application fees on successful bidders, but it neglected to recognize that its rules as then written expressly barred such fees. As a result, the Commission did not amend its rules to eliminate that prohibition, consequently, remained in full force and effect. Nevertheless, the Commission, perhaps remaining unaware of the problem or perhaps simply opting to ignore it, chose to impose long-form application fees proscribed by Section 1.2107(c) from 2000-2011.

Finally, in 2011, the FCC amended that rule, but in so doing the Commission pretended that its years-long collection of those fees had not been flatly contrary to the language of its rules. At least two factors, however, undermine that pretense.

First, we have the refund paid in March, 2011 to the Auction No. 79 bidder.<sup>12</sup> While, to the best of College Creek’s knowledge, no formal opinion, letter or other explanatory document accompanied that refund, the notation included by the Commission on the refund check stub indicated that the bidder was “not required to pay fees.” That plainly belies the Commission’s less-than-subtle suggestions (in the *2011 NPRM* and the *Second Report*) that the rules had up to then required such payments.

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Procedure Act (“APA”), 5 U.S.C. §553(b)) for formal rulemakings. Section 553(b)(B) of the APA expressly exempts “rules of agency...procedure” from those steps. But the Commission *did* utilize the standard notice-and-comment process in connection with its 2011 amendment of Section 1.2107(c). It therefore appears that, contrary to its assertion in the *Second Report*, not even the Commission believed that the change involved merely a “rule of agency procedure.”

<sup>12</sup>The March, 2011 refund was paid approximately two weeks after the release of the *2011 NPRM*. The coincidence in the timing of those two events suggests that the Commission may have been prodded into revising Section 1.2107(c) by the fact that at least one party had squarely raised the issue, forcing the Commission to address its theretofore unlawful fee collection by (a) granting the refund request and (b) simultaneously revising the rule.

Second, in the *Second Report*, the Commission acknowledged that the purpose of the revision of Section 1.2107(c) was both to: (a) “rectify” the inconsistency between that section’s prohibition and the agency’s contrary historical practice, and (b) “conform the Rules to the Commission’s stated intent” in the *1998 R&O*. The Commission thus conceded that its practice up to that point had been “inconsistent” with the rules and that the rules up to that point did *not* conform to what the FCC had had in mind in 1998. But again, when formally adopted rules conflict with uncodified expressions of agency intent, it is the rules that must control. *See* Footnote 5, *supra*.

On March 27, 2013, 78 Fed. Reg. 18527 (March 27, 2013), the Commission published a notice purporting to “correct” the Federal Register summary of the *1998 R&O* - which appeared on September 11, 1998, nearly 15 years ago, 63 Fed. Reg. 48613. The “correction” involved the insertion of the following sentence into Paragraph 17 of that notice:

The Commission stated that long-form application fees will apply to the long-form applications filed by winning bidders in broadcast auctions.

The FCC’s corrective notice constitutes an admission of several points. First, the notice provides further confirmation that the *1998 R&O* did not alter Section 1.2107(c) (or any other related rule). The sentence now belatedly inserted into the Federal Register summarizes the one-sentence 1998 dictum relative to the FCC’s intent to collect application fees. If that dictum had involved addition or revision of any rule, the text of the added/revised rule would have had to have been published in the Federal Register. *See* 5 U.S.C. §553. The original 1998 publication of the *1998 R&O* contained no text of any added or revised rule, and neither does the notice. Thus, the notice re-confirms that the Commission’s 1998 dictum cannot be said to have amended any rule, including particularly Section 1.2107(c).

Second, even if the Commission had intended its one-sentence dictum to have such an effect, the fact is that that dictum was *not* published in the Federal Register until March, 2013. As a result, the dictum could *not* in any event have altered Section 1.2107(c) prior to March 27, 2013, when reference to the dictum finally wended its way into the Federal Register. *See* 5 U.S.C. §553. To be sure, agencies possess some general ability to correct minor errors or omissions in published Federal Register notices. But it is difficult to imagine that the ability extends to the insertion, *nearly 15 years after the initial publication*, of an entire sentence, especially when that sentence is apparently intended to retroactively impose on regulatees specific substantive regulatory obligations and costs.

Third, College Creek is constrained to observe that the Commission's belated effort to patch over its 1998 omission at this late date is characteristic of the agency's overall approach in this matter. Rather than acknowledge and constructively address the unlawfulness of its decade-long application fee collection process, the FCC has repeatedly attempted to fashion post hoc contrivances apparently intended to spackle over the obvious shortcomings of its conduct over the course of more than ten years of broadcast auctions.

The Federal Register publication and the issuance of the March 27<sup>th</sup> letter were coordinated so that the letter's reliance on the dictum could not be attacked as completely lacking in force and effect because the dictum had not appeared in the Federal Register. From the Commission's perspective, of course, the problem is that any regulatory force and effect the dictum might be said to have would have started as of the date of the publication, *i.e.*, March 27, 2013. *See* 5 U.S.C. §553. The publication and the Managing Director's apparently coordinated reliance on it - do, however, reinforce the perception that the Commission is engaging in

regrettably unseemly machinations in its effort to deny Petitioners the refunds to which they are entitled.

The Supreme Court has recognized that citizens have an interest in some “minimum standard of decency, honor, and reliability in their dealings with their Government,” *Heckler v. Community Health Service*, 467 U.S. 51, 60 (1984). Or, as the Court of Appeals, D.C. Circuit has observed, “citizens may reasonably expect that their Government will refrain from running circles around them.” *U.S. v. Sears, Roebuck and Co.*, 778 F.2d 810, 818 (D.C. Cir. 1985). See also, e.g. *Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting) (“Our Government should not...permit one of its arms to do that which by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government”).

The Commission appears to be trying to do just that, running circles around College Creek by collecting fees in contravention of its rules and then attempting, long after the fact, to adjust its regulatory skirts to cloak the impropriety.

In view of the foregoing circumstances, it is clear that the long-form application fees which the FCC required College Creek to submit in connection with its successful bids in Auction No. 37 were collected in contravention of the plain language of the Commission’s rules. As noted above, an agency is required to comply with its own rules. The FCC failed to do so, and has thus far failed to take any steps to remedy that failure as far as refund of Petitioner’s fees is concerned. What is particularly troubling here is not only the agency’s failure to act in a timely manner, but also its latterday efforts to distort the historical record with respect to the

matter of auction-based long-form application fees. Those efforts bespeak a predisposition on the Commission's part to retain the improperly collected fees under any and all circumstances.

Since the collection of College Creek's fees was unlawful, the Commission should be compelled to refund those fees immediately.

Requiring such a refund should impose no significant burden on the Commission at all: as demonstrated by the 2011 refund of the fees to the successful bidder in Auction No. 79, all the Commission needs to do is to cut checks in the proper amounts with the notation "not required to pay fees" included on the check stubs. Determination of the proper amount of the refund would require minimal effort (*i.e.*, review of the Commission's own auction records reflecting receipt of payments from College Creek); to the extent any question might arise in that regard, College Creek will happily cooperate with the agency to confirm correct calculation of the refunds due College Creek.

#### **IV. Conclusion**

In view of the absolute clarity of the agency's own proscription (at all times relevant to College Creek) against collection of those fees, the Letter Ruling must be overruled and an order issued compelling the Managing Director to issue a refund of the fees paid by College Creek.

Respectfully submitted

By:



Aaron P. Shainis

Counsel for

COLLEGE CREEK BROADCASTING, INC.

Shainis & Peltzman, Chartered  
1850 M Street NW, Suite 240  
Washington, DC 20036  
202-293-0011

April 29, 2013

**ATTACHMENT A**

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

MAR 27 2013

OFFICE OF  
MANAGING DIRECTOR  
Aaron P. Shainis, Esq.  
Shainis & Peltzman, Chartered  
1850 M Street NW, Suite 240  
Washington, DC 20036

Re: College Creek Broadcasting, Inc.  
FRN 0011304029

File No. BNPH-20041223ACA  
BNPH-20041223ABR  
BNPH-20041223ACB

BNPH-20041227ACN  
BNPH-20041227 ACP  
BNPH-20041227ACJ  
BNPH-20041227ACI

BNPH-20041228ABE  
BNPH-20041228ABC  
BNPH-20041228ABB  
BNPH-20041228ABA  
BNPH-20041228AAX  
BNPH-20041228AAU  
BNPH-20041228AAT  
BNPH-20041228AAS  
BNPH-20041228AAC  
BNPH-20041228AAB  
BNPH-20041228ABD  
BNPH-20041228ABK

BNPH-20041229ACC  
BNPH-20041229ADZ  
BNPH-20041229AEA  
BNPH-20041229ABR  
BNPH-20041229ABS

BNPH-20041230ADB  
BNPH-20041230ACU  
BNPH-20041230ACS  
BNPH-20041230ACQ  
BNPH-20041230ACV  
BNPH-20041230ACY  
BNPH-20041230ACZ

BNPH-20050103AAN  
BNPH-20050103AAA  
BNPH-20050103AAB  
BNPH-20050103AFI  
BNPH-20050103AAC  
BNPH-20050103AAD  
BNPH-20050103AIK

Dear Mr. Shainis:

This responds to your July 19, 2011 request for refund of application fees totaling \$108,870.00 paid by College Creek Broadcasting, Inc. (College Creek) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 37. 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 37 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order. Auction of FM Broadcast Construction Permits Closes, 20 FCC Rcd 1021, 1025 (2004) (Auction 37 Closing Notice)*. In compliance with the *Broadcast Auction Report and Order* and the *Auction 37 Closing Notice*, College Creek paid the fees at the prescribed time and in the correct amounts. This demonstrates that College Creek 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 (9<sup>th</sup> Cir. 1978); *United States v. Aarons*, 310 F.2d 341, 348 (2<sup>nd</sup> Cir. 1962).

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

Sincerely,



Mark Stephens  
Chief Financial Officer

**ATTACHMENT B**

# Shainis & Peltzman, Chartered

Counselors at Law

Suite 240

1850 M Street, N.W.

Washington, D.C. 20036

(202) 293-0011

Fax (202) 293-0810

e-mail: shainispeltzman@s-plaw.com

July 19, 2011

Aaron H. Shainis  
aaron@s-plaw.com

Lee J. Peltzman  
lee@s-plaw.com

Special Counsel  
Stephen C. Fleckur  
steve@s-plaw.com

Of Counsel  
William H. Burrows, III  
bill@s-plaw.com

Robert J. Keller  
bob@s-plaw.com

## VIA HAND DELIVERY

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

Attn: Mark Stephens  
Chief Financial Officer  
Office of the Managing Director

Re: College Creek Broadcasting, Inc.

Dear Mr. Stephens:

College Creek Broadcasting, Inc. was the winning bidder with respect to Broadcast Auction No. 37 for the facilities specified on the attached list. The imposition of fees was improper at the time the fees were collected. In this regard, Subsection (c) of Section 1.2107 of the Commission's rules included the following: "Notwithstanding any other provision in [the Commission's rules] to the contrary, high bidders need not submit an additional application filing fee with their long-form application."

The rule was operative from 1994 until June 28, 2011 – that successful bidders would not have to file application fees with their long-form applications.

It should be noted that these fees amount to \$108,870.00 (38 x \$2,865). Accordingly, it

is respectfully requested that this amount be refunded.<sup>1</sup> Your prompt attention to this matter will be greatly appreciated.

Sincerely yours,



Aaron P. Shainis

Counsel for

College Creek Broadcasting, Inc.

cc: Mark Stephens (mark.stephens@fcc.gov)

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<sup>1</sup> Should the Commission need proof of payment, it will be provided upon request. However, it is submitted that this should not be necessary since the prefixes to the file number are only given when the filing fees are paid.