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CONTROL # 1511A

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

In the Matter of	)	MD Docket No 13-163
	)	
Programmers Broadcasting, Inc.	)	File No. BNPH-200412229ABT
	)	File No. BNPH-200412229ABX
	)	
Request for Refunds of	)	
Application Fees	)	

FILED/ACCEPTED

APR 25 2013

Federal Communications Commission
Office of the Secretary

TO: Marlene H. Dortch, Secretary

For transmission to the Commission

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, Programmers Broadcasting, Inc. ("Applicant") hereby seeks review of a decision of the Commission's Chief Financial Officer ("CFO") denying a request for refund of a fee demanded of, and paid by, the Applicant in connection with the above-referenced application. A copy of the CFO's letter is included as Attachment A hereto.[1]

[1] The CFO's letter is dated March 27, 2013. Since the instant Application for Review is being filed within 30 days of that letter, it is timely. *See* Section 1.115. The Applicant notes that the matter of the Commission's unlawful collection of long-form application fees such as the Applicant's is currently under consideration before the U.S. Court of Appeals for the D.C. Circuit, *In re Legacy Communications, LLC*, No. 13-1013. The instant Application for Review is being submitted purely as a protective measure to assure the preservation of Applicant's rights pending action by the Court in that case.

Question Presented

Is not the Applicant, the high bidder in a Commission auction, entitled to a refund of an application fee for its auction-related long-form application when, at all times relevant to this matter, Section 1.2107(c) of the Commission's rules expressly provided 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 filing fee with their long-form applications.

Factor Warranting Commission Consideration

The CFO's denial of the requested refund is flatly inconsistent with Section 1.2107(c) as that rule was in effect at all times relevant to this matter. The denial thus contravenes the agency's obligation to comply with its own rules.

Discussion

1. 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 administrative state…").[2] 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, the Commission ***did*** require the Applicant to pay such a fee. Because that requirement was plainly contrary to Section 1.2107(c), refund of the fee is mandated here.

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[2] *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 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established.").

that had been adopted but not published in the Federal Register. When criminal prosecutions were brought for violations of those rules, the defendants argued that, absent compliance with the requirement of Federal Register publication, the rules could not be enforced. In each of the cited cases, the court concluded that, as long as the defendants had "actual and timely notice" of the requirement at issue, that was sufficient.

6. In both instances, the agencies in question had in fact issued very specific rules. Those rules had not, however, been published in the Federal Register. In the instant case, by contrast, the Commission did ***not*** purport to adopt ***any*** rule requiring the filing of long-form application fees, nor did it purport to revise or rescind Section 1.2107(c), which expressly and unequivocally provided that no such fees would be required. In the *1998 R&O* dictum, all the Commission did was express its plan to require some such fees at some unspecified future time.[3] But the Commission took no action to implement that plan through appropriate rulemaking efforts until 2011. *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); "Second Order", 26 FCC Rcd 9055 (2011).

7. An additional important distinction between the instant case and the two decisions relied on by the CFO: in neither of those two decisions had the agency previously adopted a rule that expressly contradicted the requirements being pressed against the defendants. Here, of course, we have Section 1.2107(c), which plainly undercuts any arguable regulatory significance that might otherwise be ascribable to the *1998 R&O* dictum.

8. It should also be emphasized that – as the CFO's reliance on the two cases suggests – the *1998 R&O* dictum had not been published in the Federal Register at any time

[3] The precise language of the dictum was "The statutorily established application fees will apply to the long-form applications filed by winning bidders."

2. In his letter the CFO seems to be saying that dictum included in Paragraph 164 of *Implementation of Section 309(j) of the Communications Act*, 13 FCC Rcd 15920 (1998) ("*1998 R&O*"), along with some auction-related public notices referencing that dictum, somehow override Section 1.2107(c). That bizarre notion is foreign to the administrative process in the United States. As noted above, an agency is bound to follow its own rules. If the agency wishes to change any of its rules, it may do so through the process set out in the Administrative Procedure Act. But the agency certainly may not simply insert a passing remark in the body of one or another agency decision and then assert that that passing remark overrides a formally-adopted rule to the contrary.

3. That is particularly true in this case because at all times relevant hereto, Section 1.2107(c), as quoted above, included the prefatory phrase "[n]otwithstanding any other provision" of the Commission's rules. In other words, even if the CFO could point to some other formally-adopted rule in defense of his position, the fact of the matter is that that theoretical other rule would be immaterial, because by its own express terms, Section 1.2107(c) overrode ***all other rules***.

4. Of course, there is no such theoretical other rule that might be said to support the CFO's position. As a result, the CFO was left to rely on the dictum from the *1998 R&O*, and the fact that dictum was later repeated in some auction-related public notices. But, again, mere dictum cannot and does not trump an otherwise clear and unequivocal rule.

5. The CFO cites two cases for the apparent proposition that "a party with actual and timely notice of a requirement is bound by its terms". *See* CFO Letter at 2 (citing *U.S. v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978) and *U.S. v. Aarons*, 310 F.2d 341, 348 (2d Cir. 1968)). Those cases don't support the CFO's position here. Both of those cases involved specific rules

relevant hereto. Curiously, on March 27, 2013 – contemporaneously with the CFO's letter – a notice did appear in the Federal Register purportedly correcting the 1998 publication of the summary of the *1998 R&O. Implementation of Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 78 Fed. Reg. 18527 (March 27, 2013). The Commission's decision to attempt to "correct" this item which had appeared nearly 15 years ago is curious because, as discussed in the text above, the Commission had already sought to formally amend 1.2107(c) in 2011. (Several petitions for reconsideration raising concerns about certain aspects of the process by which that supposed amendment was accomplished remain pending.)

9. The latter-day publication of the dictum thus could not have any effect going forward since, at least in the Commission's eyes, the supposed 2011 amendment presumably took care of that. Nor could the latter-day publication be said to have any retroactive effect because the 2013 Federal Register publication of the dictum could not (barring the availability of a time machine in good working order) have placed the Applicant on notice of the dictum when the Applicant paid the fee in question here years ago. Still, the Commission caused that "correction" to be published in the Register, which at least suggests that the Commission believes that some such publication is essential to the enforceability of the dictum, notwithstanding the CFO's claims to the contrary.[4]

10. In any event, even if the March, 2013 Federal Register publication of the dictum might have had some theoretical effect, it did not and could not alter the unlawfulness of the collection of the Applicant's fee. To recap, the Commission's ***rule*** at all times relevant hereto,

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[4] If the Commission does in fact believe that Federal Register publication, even 15 years late, is a necessary prerequisite to the enforcement of the *1998 R&O* dictum, that suggests that the CFO's reliance on the two cases discussed above is at odds with the Commission's view of the matter.

i.e., the pre-2011 version of Section 1.2107(c), clearly and unequivocally relieved the Applicant of the need to pay the long-form application fee. Moreover, that rule by its own terms – "notwithstanding any other provision of title 47" – took precedence over any other rule that might arguably have been inconsistent with it. *A fortiori* it also took precedence over any aspirational dictum tucked deeply and quietly in a Commission opinion, dictum that merely expressed, in maximally general terms, steps the Commission planned eventually to take.

11. In short, the initial collection of the Applicant's long-form application filing fee was unlawful, and the CFO's refusal to refund that fee is similarly unlawful and must be reversed.

Relief Sought

The Commission should reverse the CFO's ruling below and promptly refund the fee that was unlawfully collected from the Applicant.

Respectfully submitted,

PROGRAMMERS BROADCASTING, INC.

By: Kathleen Victory

Kathleen Victory
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703-812-0400

Its Counsel

April 25, 2013

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Kathleen Victory, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: Programmers Broadcasting, Inc.
File No. BNPH-20041229ABT
BNPH-20041229ABX
FRN 0006097794

Dear Ms. Victory:

This responds to your August 2, 2011 request for refund of application fees totaling $5,960.00 paid by Programmers Broadcasting, Inc. (Programmers) 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*, Programmers paid the fees at the prescribed time and in the correct amounts. This demonstrates that Programmers 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).

We also note your reference to the fact that a refund of a Form 301 application fee had previously been made to a winning bidder in a media service auction and your argument that such refund constitutes a direct precedent for granting this refund request. The refund you cite was made in error and the Commission is seeking return of the refunded amounts to assure that all winning bidders in broadcast auctions comply with the fee payment requirement adopted in the Broadcast Auction Report and Order and promulgated in the auctions' closing Public Notices. Absent a statutory barrier, not present here, the Government must recover funds which its agents have wrongfully, erroneously, or illegally paid. *United States v. Wurts,* 303 U.S. 414, 415-16 (1938); *Amtec Corp. v. United States,* 69 Fed. Cl. 79, 88 (2005), *aff'd,* 239 Fed. Appx. 585 (Fed. Cir. 2007; *Aetna Casualty and Surety Co. v. United States,* 208 Ct. Cl. 515, 526 F.2d 1127 (Fed. Cir. 1975), *citing Fansteel Metallurgical Corp. v. United States,* 172 F.Supp. 268, 270 (Ct. Cl. 1959) ("When a payment is erroneously or illegally made…it is not only lawful but the duty of the Government to sue for a refund thereof…"). Moreover, the erroneous refund made in this case neither binds the Commission in this matter nor requires it to make further refunds. *Office of Personnel Management v. Richmond,* 496 U.S. 414, 428 (1990); *Vernal Enterprises, Inc. v. FCC,* 335 F.3d 650, 665 (D.C. Cir. 2004); *and see WLOS TV, Inc. v. FCC,* 932 F.2d 993, 995 (D.C. Cir. 1991) (Commission may depart from policy set in a previous adjudication if it provides a reasoned analysis showing that a prior policy is being deliberately changed, not casually ignored).

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

Sincerely,

Mark Stephens
Chief Financial Officer