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FILED/ACCEPTED

APR 26 2013

Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, DC 20554

In re:	)	MD Docket No. 13-163
	)	
Fox Radio Network, LLC	)	**File No. BNPH-20070502ABW**
	)	
	)	
	)	
Refund of Application Filing Fee	)	
	)	

Filed with: **Office of the Secretary**
Directed to: **The Commission**

APPLICATION FOR REVIEW

Fox Radio Network, LLC ("Fox Radio"), by its attorney, respectfully submits an Application for Review appealing the Letter Ruling issued by the Office of Managing Director on March 27, 2013, denying a refund of the $3,210.00 broadcast application filing fee paid by Fox Radio in conjunction with a long-form construction permit application (FCC Form 301) following the conclusion of Action No. 70. With respect thereto, the following is stated:

Background

Fox Radio was the winning bidder for Permit No. MM-FM553-A in FM Auction No. 70. Following the completion of the Auction, the FCC issued a *Public Notice*, which said in relevant part:

> ***Where and How to File:*** Applicants must file accurate and complete FCC Form 301 applications electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic filing system. In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee, and information submitted on the new FCC Form 301 application by winning bidders must not constitute a major change from any information reported in the winning bidder's previously-filed short-form application (FCC Form 175).

Public Notice, DA 07-1437 at 5 (footnotes omitted). As authority for this ostensibly required payment, the Commission provided a citation to *Implementation of Section 309(j) of the*

Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd 15920, 15984 ¶ 164 (1998). That paragraph states:

> Long-form applications filed by winning bidders in broadcast auctions should include, if applicable, the exhibits required by the general Part 1 auction rules, and should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice. The statutorily established application fees will apply to the long-form applications filed by winning bidders.

Id.

Following the announcement of the winner, Fox Radio submitted an application (FCC Form 301) as directed, and paid the requisite filing fee paid indicated by the CDBS Filing System.

On June 2, 2011, a request was filed with the Office of Managing Director for refund of the application filing fee pursuant to the provision of Sections 1.2107(c) and 1.1115(a) of the Commission's rules. That request was denied by Letter dated March 27, 2013 ("*Letter*").

QUESTION PRESENTED FOR REVIEW

1. Whether the FCC violated in own rules in requiring Fox Radio to submit a filing fee in conjunction with the permit acquired through its auction bidding system, and whether the FCC further violated its rules in refusing to issue a refund.

For the reasons shown below, the Managing Director's decision was in conflict with the Commission's regulations, and must be reversed.

ARGUMENT

No Filing Fee should actually have been assessed. At the time the application was filed, Section 1.2107(c) of the Commission's rules stated:

> A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. 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.

47 C.F.R. § 1.2107(c) (emphasis added). Therefore, even though Section 1.1104 of the Rules otherwise provides for the payment of an application filing fee, by its terms, Section 1.2107 of the Commission's rules specifically overrode that rule provision.

Moreover, when this rule provision was pointed out to the Managing Director, the Managing Director was required to issue a refund for the erroneously assessed fee. The rule regarding refunds of fees specifically states:

> **§ 1.1115 Return or refund of charges.**
>
> a) All refunds will be issued to the payer named in the appropriate block of the FCC Form 159. The full amount of any fee submitted will be returned or refunded, as appropriate, under the authority granted at §0.231.
>
> (1) When no fee is required for the application or other filing. (See §1.1111).

47 C.F.R. § 1.1115(a) (emphasis added). Here, since no Filing Fee was required under the Commission's Rules in effect at that time, none should have been assessed, and it was appropriate that the application filing fee be refunded and returned.

The Managing Director's justification for refusing to refund the broadcast application filing fee does not pass muster. In *Amendment of Part I of the Commission's Rules – Competitive Bidding Procedures*, 13 FCC Rcd 374 (1997), the Commission adopted auction rules of general applicability. As the text states:

> With some exceptions, we adopt our proposal in the Notice to apply the general competitive bidding rules adopted herein to all future auctions, regardless of whether service-specific auction rules have previously been adopted. Our Part 1 rules will apply to all auctionable services, unless we determine that with regard to particular matters the adoption of service-specific rules is warranted.

Id. at 382, ¶ 5. From the plain unambiguous language of the *Report and Order*, the Part I auction rules in 1997 were designed to apply to all future auctions, unless the Commission adopts a "service-specific" rule regarding the particular matter.

While it is true that "service-specific rules" were adopted for broadcast auctions in *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920 (1998), regardless of the text of the *Report and Order*, a simple review of Appendix C to the *Report and Order* shows that no "service-specific rule" was adopted with respect to the payment of broadcast application filing fees. *Report and Order*, 13 FCC Rcd 15920, 16028-16051 (1998). Moreover, even if the *Report and Order* had adopted such a provision regarding application filing fees (which it did not), that *Report and Order* in no manner amended Section 1.2107(c) of the Commission's rules, which again, until recently amended, stated:

> A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. 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.

47 C.F.R. § 1.2107(c) (emphasis added). Therefore, even if a "service-specific rule" concerning the payment of broadcast application fees had been adopted at some point, until Section 1.2107(c) was amended (as it was for the first time in 2011), Section 1.2107(c) plainly controlled the situation concerning the requirement for payment of regulatory fees.

Finally, although the Commission amended its rules on June 20, 2011(*Amendment of the Schedule of Application Fees Set Forth in Section 1.1102 through 1.1109 of the Commission's* Rules, 26 FCC Rcd 9055 (2011)), the rule revision was not adopted until June 20, 2011, and not published in the Federal Register until June 28, 2011. As the item published in the Federal Register with respect to the rule change states, the revised rule did not become effective until June 29, 2011. 76 Fed. Reg. 37661 (2011). The Commission's recent revision of Section

1.2107(c) was not made retroactive, and generally newly adopted rules cannot arbitrarily be given retroactive effect.

A simple reading of the chronology of events demonstrates that as much as the Managing Director may wish to "turn back time" and would wish that it were otherwise, it was not permitted at that time under its own rules to assess application filing fees on winning broadcast auction applicants. Moreover, under any plain reading of the Commission's rules, the Media Bureau's *Public Notice* erroneously solicited and required the fees for winning applicants in Auction No. 70. However, notwithstanding the forgoing, the FCC is obligated to obey its own rules, and therefore, application filing fees improperly solicited may not, under the Commission's rules, be retained by the FCC, and they must be refunded.

WHEREFORE, it is respectfully requested that this Application for Review be granted.

Respectfully submitted,

FOX RADIO NETWORK, INC.

By: _____
Dan J. Alpert

Its Attorney

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April 26, 2013

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Dan J. Alpert, Esq.
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2120 N. 21st Road
Arlington, VA 22201

Re: Fox Radio Network, LLC
File No. BNPH-20070502ABW
FRN 0015843428

Dear Mr. Alpert:

This responds to your June 2, 2011 request for refund of a $3,210.00 application fee paid by Fox Radio Network, LLC (FRN) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 70. For the reasons stated below, payment of the fee was correct and no refund is warranted.

You contend that no filing fee was 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 70 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, 22 FCC Rcd 6323, 6327 (2007) (*Auction 70 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 70 Closing Notice*, FRN paid the fee at the prescribed time and in the correct amount. This demonstrates that FRN 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 fee is denied.

Sincerely,

Mark Stephens
Chief Financial Officer