

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re)
)
Legacy Communications, LLC, *et al.*,) No. 13-1013
)
Petitioners.)

**OPPOSITION OF THE FEDERAL COMMUNICATIONS
COMMISSION TO PETITION FOR WRIT OF MANDAMUS**

The Federal Communications Commission (“Commission” or “FCC”) respectfully opposes the joint petition for a writ of mandamus filed by Legacy Communications, LLC, Julie Epperson, JAB Broadcasting, LLC, Bott Communications, Inc., E-String Wireless, Ltd., Horizon Christian Fellowship, Independence Media Holdings, LLC, Delta Management Corporation, Airen Broadcasting Company, Mattox Broadcasting, Inc., Absolute Communications, LLC, Programmers Broadcasting, Inc., Tri-State Radio, LLC and William C. Doleman on January 18, 2013 (“Petition”).

Petitioners ask the Court to compel the Commission to refund filing fees that Petitioners tendered with their applications for FCC broadcast licenses or, alternatively, to compel immediate action by the Commission on Petitioners’

applications – filed three weeks ago – for administrative review of decisions by the FCC’s staff denying the requested refunds.¹

After Petitioners filed their mandamus petition, the FCC’s Office of Managing Director (“OMD”), acting on authority delegated by the Commission, denied Petitioners’ requests for refunds in a series of letter rulings.² We understand that each of Petitioners has asked the full Commission to review those staff rulings.³

As we explain, Petitioners’ request that the Court compel payment of refunds that the FCC’s staff denied is tantamount to a request for judicial review of the staff rulings. Section 5(c)(7) of the Communications Act, 47 U.S.C. § 155(c)(7), however, deprives this Court of jurisdiction to review those rulings and to compel refunds before the Commission has issued a decision on the pending applications for review.

¹ The mandamus petition and related papers identify “Delta Management Corporation” as one of the Petitioners in this case. We assume that Petitioners thereby intend to refer to Delta Media Corporation, as that entity (not Delta Management Corporation) paid, and sought a refund of, long-form broadcast application fees.

² The OMD letter rulings denying the refund requests are set forth in Attachment A to this opposition.

³ Commission counsel is in receipt of applications for review filed by nine of the fourteen petitioners. Copies of those applications are set forth in Attachment B. Counsel for Petitioners has informed Commission counsel that all Petitioners have filed such applications.

Insofar as Petitioners ask the Court to compel agency action on their refund requests, the staff already has acted on (and denied) the refund requests, and there has been no unreasonable delay on Petitioners' applications for review, which were filed only three weeks ago. Petitioners have no right to mandamus when there is an adequate administrative appeals process which they are pursuing.

Finally, on the merits, petitioners have not come close to making the requisite showing that they have a "clear and indisputable" right, *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)), to the "extraordinary remedy" of mandamus, *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 35 (1980).

STATEMENT OF THE CASE

1. Background

Congress has charged the Commission with "regulating . . . communication by . . . radio so as to make available . . . a rapid, efficient, Nation-wide, and world-wide . . . radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To discharge that responsibility, the Commission has authority, *inter alia*, to grant

licenses to applicants seeking to use the electromagnetic spectrum. 47

U.S.C. §§ 301, 308-09.

In the Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-72, Title V, 100 Stat. 82, Congress established a schedule specifying the fees regulated entities must pay the Commission for various FCC actions (such as processing of license applications). 47 U.S.C. § 159(g). The Commission in 1987 incorporated in its rules the fee schedule prescribed by statute.

Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Report and Order, 2 FCC Rcd 947, 948-49 (¶¶ 8-10) (1987). *See* 47 C.F.R. § 1.1104.⁴

Since 1987, the FCC's rules have included, among the charges specified in the fee schedule, "long-form applications" for licenses in the broadcast services. *See* 47 C.F.R. § 1.1104.⁵

In 1993, Congress authorized the Commission to conduct a competitive bidding process (or auction) in order to choose among competing applicants for spectrum for non-broadcast services. Omnibus

⁴ Pursuant to 47 U.S.C. § 159(b), the Commission has periodically adjusted the particular fees due to reflect, among other things, increased costs of processing applications. *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2009*, Report and Order, 24 FCC Rcd 10301 (2009).

⁵ A "long-form application" is one that uses FCC Form 301 ("Application for Construction Permit for Commercial Broadcast Station").

Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(1)(B), 107 Stat. 388 (1993). *See* 47 U.S.C. § 309(j)(1). As directed, the Commission adopted rules implementing this new authority in 1994. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348 (1994).

In December 1997, the Commission made a number of changes to its competitive bidding rules. *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374 (1997) (“1997 Rulemaking Order”). These changes included the adoption of section 1.2107(c) of the agency’s rules. That section 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.” 47 C.F.R. § 1.2107(c) (1998).⁶ The Commission stated that the rules it adopted in the *1997 Rulemaking Order*, including section 1.2107(c), would “apply to all auctionable services, unless [the Commission] determine[d] that with regard to particular matters the adoption of service-specific rules [was] warranted.” *1997 Rulemaking Order*, 13 FCC Rcd at 381 (¶ 5).

⁶ Unless otherwise specified, section 1.2107(c) in this opposition refers to the rule adopted in 1997, and not the subsequent amendment to that rule.

Meanwhile, Congress expanded the Commission's competitive bidding authority to permit the selection of initial licensees in commercial broadcast services. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251 (1997). In 1998, the Commission issued an order adopting rules specifically governing auctions of broadcast licenses. *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 (1998) (“*1998 Rulemaking Order*”). In that order, the Commission specified that “[t]he statutorily established application fees *will apply* to the long-form applications filed by winning bidders.” *Id.* at 15984 (¶ 164) (citing 47 C.F.R. § 1.1104) (emphasis added).

The Commission did not codify the fee requirement for long-form broadcast applications of broadcast auction winners in the Code of Federal Regulations.⁷ Nor did the Commission at that time formally amend section 1.2107(c) to reflect the adoption of this fee requirement. However, for more

⁷ The summary of the *1998 Rulemaking Order* as initially published in the Federal Register inadvertently omitted the requirement that long-form applications be submitted with an application fee. 63 Fed. Reg. 48615-48629 (Sept. 11, 1998). The Commission subsequently published a corrected Federal Register summary that included this fee requirement. 78 Fed. Reg. 18527 (Mar. 27, 2013).

than a decade after its issuance, both the Commission and the regulated industry understood the *1998 Rulemaking Order* as having adopted an uncodified rule that auction winners must pay a fee when submitting long-form applications. After each auction for broadcast licenses, the Commission issued a public notice specifying that the Commission's rules required the winning bidder to pay the requisite fee when submitting a long-form application.⁸ And until 2009, the winning bidders of broadcast auctions, including Petitioners, routinely tendered a fee with their long-form applications without protest or challenge.

On October 21, 2009, Mildred R. Porter, a winning bidder in a broadcast auction, requested a refund of the long-form application fee she had paid two days earlier, arguing that no such fee was required under section 1.2107(c). Letter from Lauren Colby, counsel for Mildred Porter, to Steven Van Roekel, Managing Director, FCC (Oct. 21, 2009) (Petition, Att. C). Several other winning bidders submitted similar refund requests.

⁸ See e.g., *Auction of FM Broadcast Construction Permits Closes*, 21 FCC Rcd 1071, 1076 (2006) (citing *1998 Rulemaking Order*, 13 FCC Rcd at 15984 (¶ 164) (“In accordance with the Commission’s rules, electronic filing of FCC Form 301 [the long-form application] must be accompanied by the appropriate application filing fee”). *Accord Auction of FM Broadcast Construction Permits Closes Winning Bidders Announced for Auction 79*, Public Notice, 24 FCC Rcd 11903, 11908 (2009); *Auction of FM Broadcast Construction Permits Closes*, Public Notice, 22 FCC Rcd 518, 523 (2007); *Auction of Full Power Television Construction Permit Closes*, Public Notice, 21 FCC Rcd 3010 (2006).

On March 3, 2011 – while these refund requests were pending – the Commission sought to “clarify the rules on the payment of [long-form] filing fees by winning bidders in auctions of construction permits in the broadcast services.” *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 (¶ 2) (2011). The Commission explained that it had “required” in its *1998 Rulemaking Order* winning bidders of broadcast auctions to submit fees when filing long-form applications but that the language of section 1.2107(c) did not reflect that subsequently adopted requirement. *Id.* The Commission therefore proposed an amendment to section 1.2107(c) “[t]o resolve any inconsistency and to conform [s]ection 1.2107(c) to the Commission’s determination in the [*1998 Rulemaking Order*].” *Id.*

On March 14, 2011 – eleven days after the Commission explicitly reaffirmed that filing fees were “required” for long-form broadcast applications (*id.*) – a member of the FCC’s staff issued checks to Ms. Porter and several other refund applicants, accompanied only by the unexplained

notation “not required to pay fee” printed on the body of the checks. *See* Petition, Att. D.⁹

In an order released on June 20, 2011, the Commission formally amended section 1.2107(c) to read as follows: “*Except as otherwise provided in § 1.1104*, high bidders need not submit an additional application filing fee with their long-form applications.” *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) (emphasis added). In adopting this rule amendment, the Commission explained that it was “clarify[ing] that high bidders must still pay” broadcast long-form application fees. *Id.* at 9055 (¶ 1). Several persons – none of whom are Petitioners – petitioned the Commission to reconsider this order. The Commission has not yet acted on those petitions.

II. The Refund Proceedings Before the FCC

The issuance of the refund checks by the FCC staff in 2011 generated numerous requests for refunds from other persons who had paid long-form application fees, including Petitioners, each of whom filed letters with the

⁹ The FCC’s Chief Financial Officer subsequently determined that the refund checks had been processed in error, and accordingly sought repayment of the mistakenly refunded fees. *E.g.*, Letter from Mark Stephens, OMD, FCC, to Mildred Porter (Mar. 27, 2013). This letter is set forth in Attachment C to this opposition.

FCC's staff between July 8, 2011 and August 9, 2011 asking for refunds of long-form application fees that they had tendered between 2004 and 2009.

On March 27, 2013, the FCC's Office of Managing Director ("OMD") issued a series of letter rulings denying the refund requests. *See* Att. A. The OMD rejected the argument that section 1.2107(c) established that Petitioners had not been required to pay a fee when submitting their long-form applications. It explained that, after section 1.1207(c) was adopted, the Commission specified in the *1998 Rulemaking Order* that the winning bidder in a broadcast service auction must pay the prescribed fee when filing a long-form application. *Id.* Because Petitioners had "paid the fees at the prescribed time and in the correct amounts," they had an "actual and timely knowledge" of the fee requirement adopted in the *1998 Rulemaking Order*, and thus were "bound by its terms." *E.g., id.* at 2. Finding that Petitioners had properly tendered fees with their long-form broadcast applications, the OMD concluded that no refunds were due.

On April 25, 2013, the Commission received applications from Petitioners seeking review of the FCC staff's refund denial rulings. *See* Att. B. The Commission has not yet acted on the applications for review.

ARGUMENT**MANDAMUS SHOULD BE DENIED**

Mandamus is a “‘drastic’” remedy, “‘reserved for really extraordinary causes.’” *Cheney*, 542 U.S. at 380 (quoting *Ex Parte Fahey*, 322 U.S. 258, 259-60 (1947)); *Kerr v. United States*, 426 U.S. 394, 402 (1976). A court may issue mandamus only if the parties seeking the writ establish that “‘no other adequate means [exist] to attain the relief [they] desire[.]’”

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (quoting *Cheney*, 542 U.S. at 380). See *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Parties seeking mandamus also must demonstrate that the agency has breached “‘a ‘clear, nondiscretionary duty,’” *Your Home Visiting Nurse Servs. v. Shalala*, 525 U.S. 449, 457 (1999) (quoting *Heckler*, 466 U.S. 602 at 616), and that their “‘right to issuance of the writ is ‘clear and indisputable,’” *Cheney*, 542 U.S. at 381 (quoting *Kerr*, 426 U.S. at 403). See *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988). And even if the litigants “‘overcome[] all these hurdles, whether mandamus relief should issue is discretionary.’” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Under these “‘exacting” standards, mandamus relief is unwarranted. *In re Cheney*, 544 F.3d 311, 313 (D.C. Cir. 2008).

A. This Court Lacks Jurisdiction To Review The Staff Denial Letters.

Petitioners seek a writ of mandamus compelling the Commission to refund the application fees they paid. Pet. 18-19. In doing so, Petitioners effectively seek review of the FCC staff rulings denying their requests for refunds – and ask this Court to overturn those rulings. The Court, however, lacks subject-matter jurisdiction to review those staff rulings.

Section 5(c)(7) of the Communications Act makes the filing of an application for review by the full Commission “a condition precedent to judicial review” of action by the agency’s staff. 47 U.S.C. § 155(c)(7). As this Court has held, section 5(c)(7) prohibits the Court from exercising jurisdiction over a Commission staff decision unless the litigant seeking relief both has asked for and has obtained a Commission-level order reviewing that decision. *International Telecard Ass’n v. FCC*, 166 F.3d 387 (D.C. Cir. 1999). Simply put, Congress “did not intend that the court review a staff decision that has not been adopted by the Commission itself.” *Id.* at 388 (quoting *Richman Brothers Records, Inc. v. FCC*, 124 F.3d 1302, 1304 (D.C. Cir. 1997)).

Insofar as Petitioners invite the Court to invalidate the FCC staff rulings denying Petitioners’ refund requests – before the Commission has the opportunity to decide in the pending administrative review proceedings

whether or not the refunds should be issued – that relief is barred by section 5(c)(7) of the Communications Act, and the petition for mandamus should be dismissed.

B. Petitioners Have Available, And Are Pursuing, Alternative Means Of Obtaining Refunds.

In the alternative, Petitioners seek to compel the FCC to “take immediate action” on their pending requests for refunds. Pet. 19. The Commission, through its staff, has now done so. On March 27, 2013, FCC staff denied Petitioners’ refund requests. *See* Att. A. On April 25, 2013, Petitioners filed applications for review of the staff’s denials. *See* Att. B. Because Petitioners have a means, which they are actively pursuing, of seeking administrative review of the refund denials, mandamus is precluded.

To ensure that “the writ will not be used as a substitute for the regular appeals process,” *Cheney*, 542 U.S. at 380-81, a writ of mandamus will not lie against an agency where, as here, the parties seeking mandamus have an alternative means to obtain the requested relief. *See Heckler*, 466 U.S. at 616. *See also Mallard v. United States Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308 (1989).

That applies with full force here. Petitioners have an adequate administrative remedy. If Petitioners remain aggrieved at the end of the administrative review process before the full Commission, they can seek

judicial review of the Commission's orders addressing their applications for review. 47 U.S.C. §§ 155(c)(7), 402(a).

Moreover, Petitioners' newly-filed applications for review have been pending for less than *three weeks*. The Commission's failure to issue a ruling within a few weeks of receiving the applications for review cannot colorably be considered the kind of "egregious" agency delay warranting the grant of a writ of mandamus. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984).

In short, Petitioners' failure to "exhaust[] all other avenues of relief," *Heckler*, 466 U.S. at 616, prevents mandamus relief here.

C. Petitioners Failed To Establish That They Have A Clear And Indisputable Right To Refunds.

Even if Petitioners had exhausted their administrative remedies, they cannot show that they have a "clear and indisputable" right, *Cheney*, 542 U.S. at 380, to the refunds they seek.

The *1998 Rulemaking Order* expressly provided that "application fees will apply to the long-form applications filed by winning bidders" in broadcast auctions. 13 FCC Rcd at 15984 (¶ 164). The Commission has applied this rule to every broadcast auction the agency has conducted – and it has announced that fact in a number of public notices. *See* n.7, *supra*. Moreover, the Commission twice has clarified that this rule, not section

1.2107(c), applies to long form applications filed in broadcast auctions.

Amendment of the Schedule of Application Fees, 26 FCC Rcd at 2512 (¶ 2);

Amendment of the Schedule of Application Fees, 26 FCC Rcd at 9055 (¶ 1).

And until 2009, Petitioners and all winning bidders of broadcast auctions, in apparent recognition that the *1998 Rulemaking Order* imposed a fee requirement, paid long-form application fees without protest or challenge.

Petitioners contend that, in light of 47 C.F.R. § 1.2107(c), long-form application fees for broadcast services are unlawful. But the Commission has construed the *1998 Rulemaking Order* as requiring the payment of fees for long-form applications filed in broadcast auctions that is separate and apart from section 1.2107(c). *Amendment of the Schedule of Application Fees*, 26 FCC Rcd at 2512 (¶ 2); *Amendment of the Schedule of Application Fees*, 26 FCC Rcd at 9055 (¶ 1). That construction reasonably harmonizes the two provisions. It avoids rendering the fee requirement set forth in the *1998 Rulemaking Order* wholly invalid, thus adhering to the well-established “principle that every word of a legal text should be given effect.” *Carus Chem. Co. v. EPA*, 395 F.3d 434, 441 (D.C. Cir. 2005). It also gives effect to the established principle of construction that “[a] specific provision” – in this case, the one that governs fees for broadcast services – “controls over one of more general application.” *Gozlon-Peretz v. United*

States, 498 U.S. 395, 407 (1991). At a minimum, the Commission’s reasonable construction of its own rules deserves deference. *See, e.g., Laclede Gas Co. v. FERC*, 997 F.2d 936, 943-44 (D.C. Cir. 1993) (quoting *Martin v. OSHA*, 499 U.S. 144, 150 (1991) (recognizing “fundamental principle that ‘an agency’s construction of its own regulations is entitled to substantial deference’ and must be given effect as long as it is reasonable.”) (internal citations omitted).

Moreover, construing the *1998 Rulemaking Order* to impose a fee requirement effective despite section 1.2107(c) is consistent with the regulatory history of section 1.2107(c). In the *1997 Rulemaking Order*, the Commission stated that section 1.2107(c) and the other rules it adopted would apply unless the Commission subsequently adopted a different service-specific rule. *1997 Rulemaking Order*, 13 FCC Rcd at 382 (¶ 5). The fee requirement in the *1998 Rulemaking Order* for broadcast long-form applications is the very type of service-specific rule that the Commission in the *1997 Rulemaking Order* envisioned would supersede the general rules adopted in the *1997 Rulemaking Order*.¹⁰ The staff’s refund denials thus are

¹⁰ Although paragraph 164 of the *1998 Rulemaking Order* setting forth the fee requirement was not published in the Federal Register until 2013 (*see* n.7, *supra*), Petitioners’ payment of the fees set forth in that paragraph demonstrates beyond any doubt that they had actual notice of the fee requirement, such that they were bound by it. 47 C.F.R. § 0.445(e). *See*

not so clearly in error to warrant mandamus relief, even if the Court has jurisdiction to review them in advance of the disposition of Petitioners' administrative appeals.

CONCLUSION

Insofar as the petition asks the Court to compel payment of refunds, it should be dismissed for lack of jurisdiction. Insofar as the petition seeks an order compelling immediate Commission action on the pending applications

for administrative review of the FCC staff's denials of refunds, it should be denied.

Respectfully submitted,

Sean A. Lev
General Counsel

Peter Karanjia
Deputy General Counsel

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/s/ Laurel R. Bergold

Laurel R. Bergold
Counsel

Federal Communications Commission
Washington, D.C. 20554
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May 15, 2013

Attachment A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Susan A. Marshall, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: Tri State Radio, LLC
File No. BNPB-20070226AFD

Dear Ms. Marshall:

This responds to your July 22, 2011 request for refund of a \$3,210.00 application fee paid by Tri State Radio, LLC (Tri State) in conjunction with the filing of the a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 68. 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.

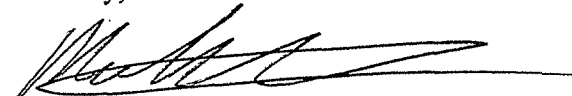
The Public Notice issued after the close of Auction 68 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order. Auction of FM Broadcast Construction Permits Closes*, 22 FCC Rcd 518, 523 (2007) (*Auction 68 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 68 Closing Notice*, Tri State paid the fee at the prescribed time and in the correct amount. This demonstrates that Tri State 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 fee is denied.

Sincerely,



Mark Stephens
Chief financial Officer

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Richard F. Swift, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: William C. Doleman
File No. BNPB-20050103AGB
BNPB-20051013AGD

Dear Mr. Swift:

This responds to your August 9, 2011 request for refund of application fees totaling \$5,960.00 paid by William C. Doleman 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. 97-32*, 13 FCC Red 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.

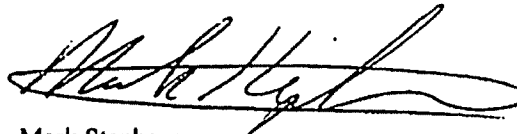
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Red 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*, Mr. Doleman paid the fees at the prescribed time and in the correct amounts. This demonstrates that Mr. Doleman 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. Arons*, 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), *quoting 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

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.

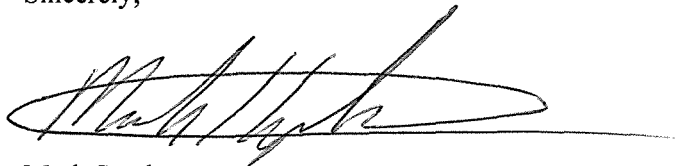
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television 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,

A handwritten signature in black ink, appearing to read 'Mark Stephens', written over a horizontal line.

Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Mattox Broadcasting, Inc.
File No. BNPH-20070501AFY

Dear Ms. Goepp:

This responds to your July 11, 2011 request for refund of a \$3,210.00 application fee paid by Mattox Broadcasting, Inc. (Mattox) 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.

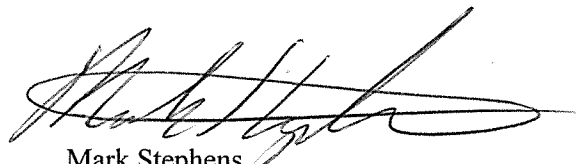
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television 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*, 221 FCC Rcd 6326, 6327 (2007) (*Auction 70 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 70 Closing Notice*, Mattox paid the fee at the prescribed time and in the correct amount. This demonstrates that Mattox 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 fee is denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Stephens', written over a horizontal line.

Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Legacy Communications, LLC
File No. BNPH-20060309ACU

Dear Ms. Goepp:

This responds to your July 8, 2011 request for refund of a \$2,980.00 application fee paid by Legacy Communications, LLC (Legacy) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 62. 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 62 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*, 21 FCC Rcd 1071, 1076 (2006) (*Auction 62 Closing Notice*). In compliance with the *Broadcast Auction Report and Order*

and the *Auction 62 Closing Notice*, Legacy paid the fee at the prescribed time and in the correct amount. This demonstrates that Legacy 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 fee is denied.

Sincerely,



Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Julie Epperson
File No. BNPH-20050103AFG

Dear Ms. Goepp:

This responds to your July 8, 2011 request for refund of a \$2,980.00 application fee paid by Julie Epperson in conjunction with the filing of long form construction permit application (FCC Form 301) following the conclusion of Auction No. 37. 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 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*, Ms. Epperson paid the fee at the prescribed time and in the correct

amount. This demonstrates that Ms. Epperson 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 fee is denied.

Sincerely,



Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: JAB Broadcasting, LLC
File No. BNPB-20060310ACA

Dear Ms. Goepp:

This responds to your August 1, 2011 request for refund of a \$2,980.00 application fee paid by JAB Broadcasting, LLC (JAB) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 62. 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 62 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*, 21 FCC Rcd 1071,

1076 (2006). In compliance with the *Broadcast Auction Report and Order* and the Auction 62 Public Notice, Porter Hogan paid the fee at the prescribed time and in the correct amount. This demonstrates that Porter Hogan 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 fee is denied.

Sincerely,



Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Independence Media Holdings
File No. BNPH-20070430AAI

Dear Ms. Goepp:

This responds to your August 1, 2011 request for refund of a \$3,210.00 application fee paid by Independence Media Holdings (Independence) 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*, Independence paid the fee at the prescribed time and in the correct amount. This demonstrates that Independence 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 fee is denied.

Sincerely,



Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Horizon Christian Fellowship
File No. BNPB-20060310ACO
BNPB-20060310ACP
BNPB-20060310ADK
BNPB-20060310ACM
BNPB-20060310ACT
BNPB-20060310ADG
BNPB-20060310ACK

Dear Ms. Goepf:

This responds to your August 1, 2011 request for refund of a \$20,860.00 application fees paid by Horizon Christian Fellowship (HCF) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 62. 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 62 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*, 21 FCC Rcd 1071, 1076 (2006) (*Auction 62 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 62 Closing Notice*, HCF paid the fees at the prescribed time and in the correct amount. This demonstrates that HCF 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

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: E-String Wireless, Ltd.
BNPH-20050103AHW
BNPH-20050103AGM
BNPH-20070529AFO

Dear Ms. Goepp:

This responds to your August 1, 2011 request for refunds of application fees totaling \$9,170.00 paid by E-String Wireless, Ltd. (E-String) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction Nos. 37 and 70. 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 Notices issued after the close of Auctions 37 and 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*, 20 FCC Rcd

1021,1025 (2004) (*Auction 37 Closing Notice*) and 22 FCC Rcd 6323, 6327 (2007) (*Auction 70 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 37 and 70 Closing Notices*, E-String paid the fees at the prescribed times and in the correct amounts. This demonstrates that E-String 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

FEDERAL COMMUNICATIONS COMMISSION
Washington, D, C. 20554
March 27, 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Delta Media Corporation
File No. BNPB-20041227ABP
BNPB-20091016AFX
BNPB-20091016AEB

Dear Ms. Goepf:

This responds to your July 11, 2011 request for refunds of application fees totaling \$9,710.00 paid by Delta Media Corporation (Delta) 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*, Delta paid the fees at the prescribed time and in the correct amounts. This demonstrates that Delta 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,

A handwritten signature in black ink, appearing to read 'Mark Stephens', written over a horizontal line.

Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Bott Communications, Inc.
File No. BNPH-20041220AAM

Dear Ms. Goepp:

This responds to your August 1, 2011 request for refund of a \$2,980.00 application fee paid by Bott Communications, Inc. (Bott) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 37. 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.

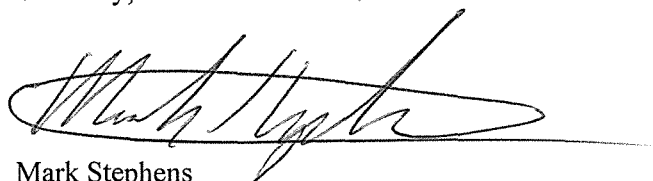
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television 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 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*, Bott paid the fee at the prescribed time and in the correct amount. This demonstrates that Bott 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 fee is denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Stephens", written over a horizontal line.

Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 27 2013

Suzanne E. Rogers, President
Airen Broadcasting Company
455 Capitol Mall, Suite 210
Sacramento, CA 95814

Re: Airen Broadcasting Company
File No. BNPH-20041223ABI
BNPH-20060308AII
FRN 0011337649

Dear Ms. Rogers:

This responds to your July 11, 2011 request for refund of application fees totaling \$5,960.00 paid by Airen Broadcasting Company (Airen) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction Nos. 37 and 62. 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.

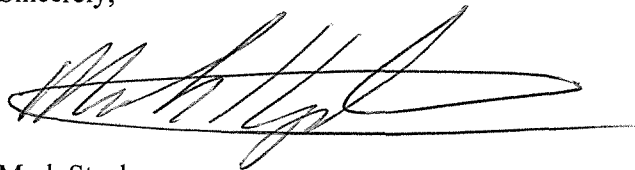
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television 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 Notices issued after the close of Auctions 37 and 62 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*) and 21 FCC Rcd 1071, 1076 (2006) (*Auction 62 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 37 and 62 Closing Notices*, Airen paid the fees at the prescribed times and in the correct amounts. This demonstrates that Airen 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,

A handwritten signature in black ink, appearing to read 'Mark Stephens', written over a horizontal line.

Mark Stephens
Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Susan A. Marshall, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: Absolute Communications, LLC
File No. BNPH-20041227AAB

Dear Ms. Marshall:

This responds to your July 21, 2011 request for refund of a \$2,980.00 application fee paid by Absolute Communications, LLC (Absolute) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 37. 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 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*, Absolute paid the fee at the prescribed time and in the correct amount. This demonstrates that Absolute 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 fee is denied.

Sincerely,



Mark Stephens
Chief Financial Officer

Attachment B

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

In the Matter of)
)
William C. Doleman) File Nos. BNPH-20050103AGB
) BNPH-20051013AGD
)
Request for Refund of) FRN: 0011-3372-68
Application Fee)

TO: Marlene H. Dortch, Secretary
For transmission to the Commission

FILED/ACCEPTED

APR 24 2013

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, William C. Doleman ("Applicant") hereby seeks review of a decision of the Commission's Chief Financial Officer ("CFO") denying a request for refund of fees 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.

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.").

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

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.

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

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 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

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.

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, *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 fees was unlawful, and the CFO's refusal to refund those fees is similarly unlawful and must be reversed.

Relief Sought

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

Respectfully submitted,

WILLIAM C. DOLEMAN

By: 

Richard F. Swift
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
Telephone: (703) 812-0400

His Counsel

April 24, 2013

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Richard F. Swift, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: William C. Doleman
File No. BNPH-20050103AGB
BNPH-20051013AGD

Dear Mr. Swift:

This responds to your August 9, 2011 request for refund of application fees totaling \$5,960.00 paid by William C. Doleman 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.

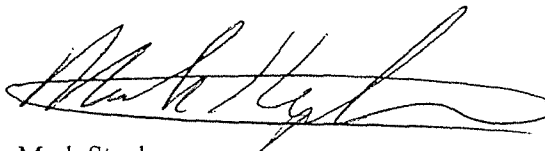
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television 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*, Mr. Doleman paid the fees at the prescribed time and in the correct amounts. This demonstrates that Mr. Doleman 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,

A handwritten signature in black ink, appearing to read "Mark Stephens", written over a horizontal line.

Mark Stephens
Chief Financial Officer



ORIGINAL

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

In the Matter of)
)
TRI STATE RADIO, LLC)
)
Request for Refund of)
Application Fee)

File No. BNPB-20070226AFD

FILED/ACCEPTED

TO: Marlene H. Dortch, Secretary

For transmission to the Commission

APR 25 2013

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, Tri State Radio, LLC ("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.

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.").

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

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.”

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,

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,

TRI STATE RADIO, LLC



Susan A. Marshall

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0400

April 25, 2013

Its Attorney

ATTACHMENT A

I

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Susan A. Marshall, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: Tri State Radio, LLC
File No. BNPH-20070226AFD

Dear Ms. Marshall:

This responds to your July 22, 2011 request for refund of a \$3,210.00 application fee paid by Tri State Radio, LLC (Tri State) in conjunction with the filing of the a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 68. 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.

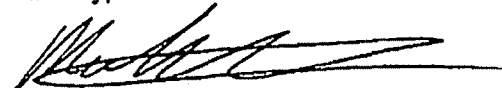
The Public Notice issued after the close of Auction 68 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order. Auction of FM Broadcast Construction Permits Closes*, 22 FCC Rcd 518, 523 (2007) (*Auction 68 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 68 Closing Notice*, Tri State paid the fee at the prescribed time and in the correct amount. This demonstrates that Tri State 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 fee is denied.

Sincerely,



Mark Stephens
Chief financial Officer

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.

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,

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
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22208
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.

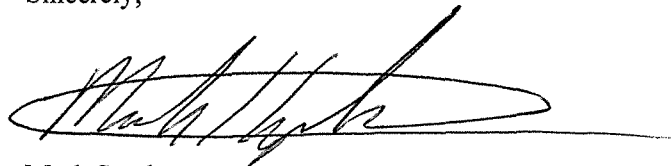
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television 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 Red 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,

A handwritten signature in black ink, appearing to read "Mark Stephens", written over a horizontal line.

Mark Stephens
Chief Financial Officer

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

 ORIGINAL

In the Matter of)
)
MATTOX BROADCASTING, INC.)
)
Request for Refund of)
Application Fee)

File No. BNPH-20070501AFY

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, Mattox 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.

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.").

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

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.”

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,

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.

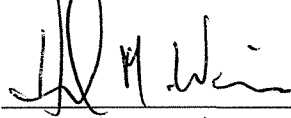
i.e., the pre-2011 version of Section 1.2107(c), clearly and unequivocally relieved the Applicant of the need to pay the long-form application fee. Moreover, that rule by its own terms – “notwithstanding any other provision of title 47” – took precedence over any other rule that might arguably have been 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,



Howard M. Weiss

Fletcher, Heald & Hildreth, PLC
1300 N. 17th Street, 11th Flr.
Arlington, VA 22209
(703) 812-0400

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Mattox Broadcasting, Inc.
File No. BNPH-20070501AFY

Dear Ms. Goepp:

This responds to your July 11, 2011 request for refund of a \$3,210.00 application fee paid by Mattox Broadcasting, Inc. (Mattox) 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 Red 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.

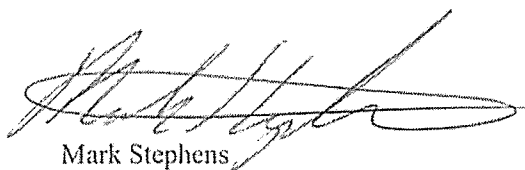
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Red 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*, 221 FCC Rcd 6326, 6327 (2007) (*Auction 70 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 70 Closing Notice*, Mattox paid the fee at the prescribed time and in the correct amount. This demonstrates that Mattox 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 fee is denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Stephens", written over a horizontal line.

Mark Stephens
Chief Financial Officer

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

In the Matter of)
)
Legacy Communications, LLC)
)
Request for Refund of)
Application Fee)

File No. BNPH-20060309ACU

FILED/ACCEPTED

TO: Marlene H. Dortch, Secretary

APR 25 2013

For transmission to the Commission

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, Legacy Communications, LLC ("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.

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.").

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

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.”

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,

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.

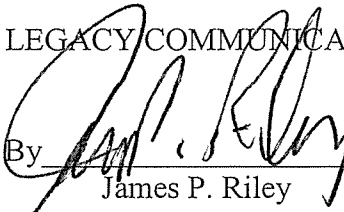
Relief Sought

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

Respectfully submitted,

LEGACY COMMUNICATIONS, LLC

By


James P. Riley

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0400

April 25, 2013

Its Attorneys

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Legacy Communications, LLC
File No. BNPB-20060309ACU

Dear Ms. Goepp:

This responds to your July 8, 2011 request for refund of a \$2,980.00 application fee paid by Legacy Communications, LLC (Legacy) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 62. 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 62 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*, 21 FCC Rcd 1071, 1076 (2006) (*Auction 62 Closing Notice*). In compliance with the *Broadcast Auction Report and Order*

and the *Auction 62 Closing Notice*, Legacy paid the fee at the prescribed time and in the correct amount. This demonstrates that Legacy 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 fee is denied.

Sincerely,



Mark Stephens
Chief Financial Officer

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

In the Matter of)
)
Julie Epperson) File No. BNPH-20050103AFG
)
Request for Refund of)
Application Fee)

FILED/ACCEPTED

TO: Marlene H. Dortch, Secretary
For transmission to the Commission

APR 25 2013

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, Julie Epperson, ("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.

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.").

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

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.”

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,

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,

JULIE EPPERSON

By 

James P. Riley

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0400

April 25, 2013

Her Attorneys

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Julie Epperson
File No. BNPH-20050103AFG

Dear Ms. Goepp:

This responds to your July 8, 2011 request for refund of a \$2,980.00 application fee paid by Julie Epperson in conjunction with the filing of long form construction permit application (FCC Form 301) following the conclusion of Auction No. 37. 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 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*, Ms. Epperson paid the fee at the prescribed time and in the correct

amount. This demonstrates that Ms. Epperson 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 fee is denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Stephens', written over a horizontal line.

Mark Stephens
Chief Financial Officer



ORIGINAL

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

In the Matter of)
)
DELTA MEDIA CORPORATION)
)
Request for Refund of)
Application Fee)

File Nos. BNPH-2004127ABP
BNPH-20091016ADX
BNPH-20091016AEB

TO: Marlene H. Dortch, Secretary

FILED/ACCEPTED

For transmission to the Commission

APR 25 2013

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission’s Rules, Delta Media Corporation (“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.

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.").

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

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.”

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,

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.

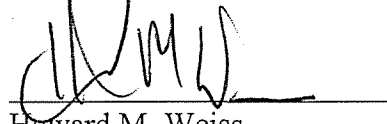
i.e., the pre-2011 version of Section 1.2107(c), clearly and unequivocally relieved the Applicant of the need to pay the long-form application fee. Moreover, that rule by its own terms – “notwithstanding any other provision of title 47” – took precedence over any other rule that might arguably have been 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,



Howard M. Weiss

Fletcher, Heald & Hildreth, PLC
1300 N. 17th Street, 11th Flr.
Arlington, VA 22209
(703) 812-0400

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

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

Re: Delta Media Corporation
File No. BNPH-20041227ABP
BNPH-20091016ADX
BNPH-20091016AEB

Dear Ms. Goepp:

This responds to your July 11, 2011 request for refunds of application fees totaling \$9,710.00 paid by Delta Media Corporation (Delta) 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 Red 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.

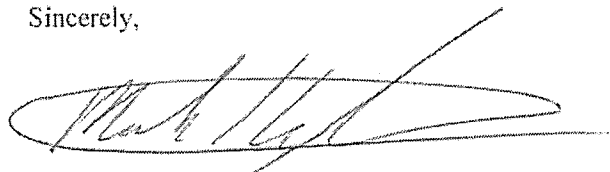
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Red 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*, Delta paid the fees at the prescribed time and in the correct amounts. This demonstrates that Delta 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,

A handwritten signature in black ink, appearing to read "Mark Stephens", written over a horizontal line.

Mark Stephens
Chief Financial Officer

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

In the Matter of)
)
AIREN BROADCASTING COMPANY)
)
Request for Refund of)
Application Fee)

File Nos. BNPH-20041223ABI
BNPH-20060308AII

TO: Marlene H. Dortch, Secretary

FILED/ACCEPTED

For transmission to the Commission

APR 25 2013

Federal Communications Commission,
Office of the Secretary

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission’s Rules, Airen Broadcasting Company (“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.

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.").

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

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.”

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,

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.

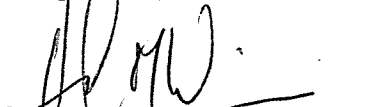
i.e., the pre-2011 version of Section 1.2107(c), clearly and unequivocally relieved the Applicant of the need to pay the long-form application fee. Moreover, that rule by its own terms – “notwithstanding any other provision of title 47” – took precedence over any other rule that might arguably have been 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,


Howard M. Weiss

Fletcher, Heald & Hildreth, PLC
1300 N. 17th Street, 11th Flr.
Arlington, VA 22209
(703) 812-0400

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 27 2013

Suzanne E. Rogers, President
Airen Broadcasting Company
455 Capitol Mall, Suite 210
Sacramento, CA 95814

Re: Airen Broadcasting Company
File No. BNPB-20041223ABI
BNPB-20060308AII
FRN 0011337649

Dear Ms. Rogers:

This responds to your July 11, 2011 request for refund of application fees totaling \$5,960.00 paid by Airen Broadcasting Company (Airen) in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction Nos. 37 and 62. 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.

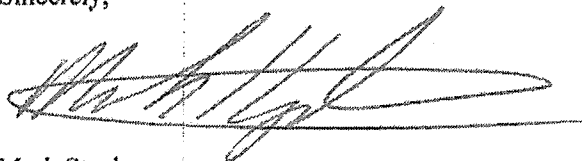
The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television 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 Notices issued after the close of Auctions 37 and 62 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 Red 1021, 1025 (2004) (*Auction 37 Closing Notice*) and 21 FCC Red 1071, 1076 (2006) (*Auction 62 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 37 and 62 Closing Notices*, Airen paid the fees at the prescribed times and in the correct amounts. This demonstrates that Airen 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. Arons*, 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

COPY

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

In the Matter of)
)
ABSOLUTE COMMUNICATIONS, LLC)
)
Request for Refund of)
Application Fee)

File No. BNPH-20041227AAB

FILED/ACCEPTED

TO: Marlene H. Dortch, Secretary

APR 24 2013

For transmission to the Commission

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission’s Rules, Absolute Communications, LLC (“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.

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.").

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

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.”

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,

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,

ABSOLUTE COMMUNICATIONS, LLC



Susan A. Marshall

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0400

April 24, 2013

Its Counsel

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR 27 2013

OFFICE OF
MANAGING DIRECTOR

Susan A. Marshall, Esq.
Fletcher, Heald & Hildreth
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: Absolute Communications, LLC
File No. BNPH-20041227AAB

Dear Ms. Marshall:

This responds to your July 21, 2011 request for refund of a \$2,980.00 application fee paid by Absolute Communications, LLC (Absolute) in conjunction with the filing of a long form construction permit application (FCC Form 301) following the conclusion of Auction No. 37. 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 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*, Absolute paid the fee at the prescribed time and in the correct amount. This demonstrates that Absolute 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 fee is denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Stephens', written over a horizontal line.

Mark Stephens
Chief Financial Officer

Attachment C

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

March 27, 2013

Mildred R. Porter
4400 Clear Creek Parkway
Northport, AL 35475

Re: Erroneous Refund of Long Form
Application Fee
FRN 0001874651

**IMPORTANT NOTICE OF A DEBT OWED TO THE UNITED
STATES PAYABLE WITHIN THIRTY (30) DAYS**

Dear Ms. Porter:

Pursuant to 47 C.F.R. § 1.1911, this is a demand for payment of a debt owed to the United States. This letter notifies you of (a) the basis for your indebtedness; (b) your rights; (c) additional charges; (d) consequences for failing to pay; (e) the date by which payment should be made to avoid late charges and enforced collection; and (f) payment and contact information.

Demand is hereby made for payment of \$3,365.00 (the "Debt") to the Federal Communications Commission (the "Commission") within 30 days of the date of this letter (the "due date"). Payment of the Debt must be sent addressed to the Commission at the following address: U.S. Bank, P.O. Box 979088, St. Louis, MO 63197-9000. To ensure that you receive proper credit for your payment, you must include a completed Form 159 with your payment, using MTR as the payment transaction code on the Form 159. A copy of the Form 159 is enclosed.

If you do not pay or otherwise resolve the Debt by the due date, interest at the Treasury rate will begin to accrue on the Debt, beginning on the day after the due date (the delinquency date) and will continue accruing until all amounts owed to the Commission hereunder are paid in full. If you do not pay the Debt by the due date, you will also owe the Commission an administrative fee of \$50 to defray the Commission's cost of processing and handling your delinquent Debt. If you pay the Debt to the Commission within thirty days of the delinquency date, the Commission will waive the accrued interest on the Debt and its administrative fee.

Further, if you do not pay all amounts owed hereunder within 90 days of the due date, an additional penalty rate of 6% per annum will begin to accrue on that portion of the Debt that remains outstanding until all debt owed to the Commission hereunder is paid in full or is otherwise resolved to the Commission's satisfaction.

The Basis for Your Indebtedness

The basis for your indebtedness is an erroneous refund by Commission staff on March 14, 2011 of a long form application fee that the late Lauren A. Colby, Esq. had correctly paid on your behalf on October 19, 2009 in conjunction with your winning bid in Auction 79. The Commission requires winning bidders in media service auctions to file long form construction permit applications accompanied by the statutorily established application fee. *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). The Public Notice issued after the close of Auction 79 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee." *Auction of FM Broadcast Construction Permits Closes*, 24 FCC Rcd 11903, 11908 (2009) (*Auction 79 Closing Notice*). The fact that you paid the fee in the correct amount at the time specified demonstrates that you had actual and timely notice of this requirement and are therefore bound by its terms. *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). Therefore, the money erroneously refunded to you is the basis of the Debt you owe to the United States.

The staff error in issuing a refund does not affect the fact that a debt is owed nor does it affect the Commission's duty to demand its repayment. 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...").

Your Rights

If you wish to submit a written request to (1) inspect or copy records relating to the Debt, (2) request a review of the basis for the Debt, 47 C.F.R. §1.1911(d); or (3) enter into an agreement to repay the Debt in installments, 47 C.F.R. § 1.1914, you must do so within fifteen (15) days of the date of this letter by sending either a letter or an e-mail specifying the nature of your request to the Commission at the address shown below. You must include with your request to repay the Debt in installments a current financial statement, executed under penalty of perjury, showing your assets, liabilities, income, and expenses, and demonstrating your financial inability to pay your Debt in full on the due date, as well as any other relevant verified documentation supporting your request. The Commission may also require you to provide additional documents that it deems necessary to support your request for installment payments and, in any event, any decision to grant or deny your request is in the sole discretion of the Commission. If you do not exercise your right to request inspection and copying of documents and/or to request an installment payment plan and/or to request a review of the basis for the Debt within the 15 days of the date of this letter, you will be deemed to have waived any right not exercised. You may also file either a petition for reconsideration or an application for review of this demand letter within 30 days of its release, as provided at 47 C.F.R. §1.104(b).

Finally, you may submit a written request (via letter or email) to the Commission to compromise the Debt pursuant to 47 C.F.R. §1.1915. Your request must include a full written justification of your request to compromise the Debt, must address the bases of compromise set forth in 31 C.F.R. §902.2 and must include verified financial information sufficient to justify the requested compromise.

Consequences for Failing to Pay

In addition to assessing interest, penalties and costs, the Commission is required to take any appropriate steps to collect delinquent debt and will do so in this case without further notice to you if the Debt is not paid as demanded above. Those steps include:

- Immediately offsetting the Debt against any debts owed to you by the Commission.
- Referring the Debt to the United States Department of Treasury for further collection including via centralized offset of the Debt against any payments (e.g. income tax refunds, contractor/vendor payments and any other non-exempt Federal payments) owed to you by the United States or via private debt collection agencies used by Treasury to collect debt. The Commission is required to refer debt that has been delinquent for 180 days or more to the Treasury Department for collection and may refer the Debt to the Treasury Department any time after the due date. If the Commission refers your Debt to the Treasury Department, the Treasury Department will assess additional charges against you.
- Reporting the Debt and your payment history to credit bureaus.
- Referring the Debt to the United States Department of Justice for litigation and collection, resulting in additional charges to you.

Pursuant to 47 C.F.R. § 1.1910(b)(2), the Commission will also withhold action on or dismiss all applications you have filed, including applications for a license, permit, other privileges or fee waivers, and petitions for reconsideration, until full payment of the delinquent Debt or until an arrangement to pay the Debt is made. The remedies and sanctions enumerated above or otherwise provided for in 47 C.F.R. § 1.1901 *et seq.* are not exclusive. Pursuant to 47 C.F.R. § 1.1942 the Commission may impose other sanctions permitted by law for any inexcusable, prolonged, or repeated failure to repay your Debt.

Contact Information

Written requests to inspect and copy records, to obtain a review of the basis of your indebtedness, enter into an installment payment plan, or compromise the Debt should be sent to the

undersigned. In addition, if you have questions about this demand letter, please contact the undersigned.

Mark Stephens
Chief Financial Officer
Federal Communications Commission
445 12th Street S.W., Room 1-A623
Washington, D.C. 20554

Phone: (202) 418-0817
Email: Mark.Stephens@fcc.gov

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Stephens', written over a horizontal line.

Mark Stephens
Chief Financial Officer

