

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

In re Application of)
TOTALLY JESUS NETWORK, INC.)

For a Construction Permit for a)
New Noncommercial Educational)
FM Station at Gold Beach, Oregon)

) File No. BNPED-
) Facility ID No. 175729

BNPED-
20071018AGN
FACTD 172931

TO: The Secretary
ATTN: The Commission

FILED/ACCEPTED

SEP -9 2011

APPLICATION FOR REVIEW

Federal Communications Commission
Office of the Secretary

Totally Jesus Network, Inc. ("Applicant"), by counsel and pursuant to §1.115 of the Commission's rules, hereby requests that the full Commission review the actions of the Media Bureau in denying Applicant's request for reconsideration of the Bureau's denial of Applicant's request for a waiver of the filing deadline for the October, 2007 NCE FM filing window in *NCE FM New Station and Major Change Applications Dismissed for Failure to Timely File*, Public Notice, 25 FCC Rcd. 13065 (MB 2010) (hereinafter the "Waiver Order"). The Bureau's decision on reconsideration is found in *Donald E. Martin, Esq.*, Ref. 1800B3-ATS, rel. August 10, 2011 (hereinafter the "Reconsideration Order"). Applicant attempted to submit the above-identified application during the filing window, but was hindered in that effort by the degraded performance and nonperformance of the Commission's online electronic filing system. After the close of the filing window, Applicant requested a waiver of the filing deadline so as to be able to submit its application after the deadline. The Waiver Order was the Bureau's response to that request.

Questions Presented for Review

The following questions are presented for review in this matter:

1. Whether the Bureau's action in denying Applicant's waiver request was contrary to binding precedent in the Commission's decision in *Roamer One, Inc.*, 17 FCC Rcd. 3287 (2002).
2. Whether the Bureau had the authority to establish an electronic filing deadline at a time other than midnight as prescribed in §1.4(f) of the Commission's rules.
3. Whether the Bureau's action in denying Applicant's waiver request was arbitrary and capricious.

Background

The Commission opened a filing window for applications for new and modified noncommercial educational FM stations in October, 2007 that was planned to conclude on October 19.¹ The CDBS filing system experienced an "outage" between 1:30 a.m. and 8:00 a.m. on October 19, a Friday. To compensate for this loss of filing time, the Media Bureau extended the filing window until 2:00 p.m. on October 22, the following Monday. In the Public Notice announcing the extension, the Bureau said that it was "necessary to avoid any hardship resulting" from the outage.²

¹ See, *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 6726 (MB 2007).

² See, *Media Bureau to Extend Window for NCE FM New Station and Major Change Applications*, Public Notice, 22 FCC Rcd 18680 (MB 2007).

However, the degraded performance of the online filing system continued through the weekend. The operational speed of the system was extremely slow and another complete stoppage occurred approximately between the hours of 1:00 a.m. and 3:00 a.m. on October 22.

Applicant attempted to file its above-identified application in this window, but that effort was thwarted by the chronic under-performance and sometimes complete non-performance of the Commission's online application filing mechanism. All of Applicant's application had been uploaded into the CDBS and all that remained to do was a final review and signature before filing. Upon the conclusion of the filing window at 2:00 p.m. on October 22, the CDBS system was completely inoperable by the public until late on October 24. The only complete version of the application that existed at that time was the virtual copy on the Commission's computer. Prior to the restart of the CDBS, it was impossible to retrieve and print out a paper copy of the application. On October 25, Applicant's counsel left on a previously-scheduled business trip for the remainder of the week. Upon his return to the office, a paper copy of the application was prepared. That paper copy was submitted to the Commission with a Petition for Waiver and Acceptance of Application on October 31. It was this Petition that the Bureau denied nearly three years later in the Waiver Order.

Argument

The FCC is appropriately strict in adhering to the deadlines for filing applications in the context of application filing windows. However, the Commission has recognized that there can be "unusual or compelling circumstances" that justify relaxation of that standard and waivers of the deadline. That is what the agency pronounced in its Public Notice in *FCC Overrules*

*Caldwell Television Associates, Ltd.*³ An excusable untimely filing could have resulted from a “calamity of such a widespread nature that even the best of planning could not have avoided it.” The Commission expounded on the kinds of events that it might consider to justify a waiver of a filing deadline: “The Commission will consider clearly unforeseeable circumstances as grounds for waiver – such as a debilitating earthquake or a city-wide power outage which brings transportation to a halt.”⁴

The specific conditions mentioned by the FCC concern events external to the agency, beyond the control of the Commission, applicants or their agents. The problem facing Applicant and many other filers during the 2007 filing window concerned a factor uniquely under the Commission’s control. That was the quality of the computer connection offered to online filers attempting to submit applications electronically. Applicants have no choice about how to submit their applications. The Commission requires that all Form 340 applications (the form used to apply for an NCE construction permit) be submitted online through the computerized mechanism that it provides to the public. It is therefore incumbent upon the agency to provide an online connection with the capacity and efficiency to handle the load of applications to be offered by the public. The Bureau essentially acknowledged this responsibility in extending the filing window closing from October 19 to October 22. Consequently, Applicant should not bear the consequences of the Bureau’s failure to provide the online filing facility throughout the remainder of the announced schedule for the filing window. This incident met the criteria set out

³ 58 RR2d 1706 (1984).

⁴ *Ibid.*

in *Caldwell*, above, namely, unforeseeable circumstances that bring transportation to a halt. In this case, it was transportation on the Internet that came to a halt.

In the Waiver Order, the Commission rejected similar waiver requests by 49 different applicants who collectively attempted to file 58 applications. The sheer volume of these requests is compelling evidence that there was a miscarriage of justice in these incidents. In failing to take responsibility for its own service failure in this case, the Bureau contradicts Commission precedent set in a case involving an incredibly similar fact pattern. In *Roamer One, Inc.*, 17 FCC Rcd 3287 (2002), the Commission granted waivers of a filing window deadline because it said that itself – the FCC – appeared “to be at least partially responsible for technical difficulties associated with the filing of applications . . .”⁵ It should be noted that the *Roamer One* case involved just one party attempting to file applications, in contrast to the several dozen applicants who have requested waivers of the NCE FM filing window.

The Bureau attempts in the Reconsideration Order to distinguish *Roamer One* from this case. The *Roamer One* applicant apparently was in contact with Commission staff during its difficulties, whereas in this case, there is “no record of [Applicant’s] . . . efforts to work with Commission staff . . .”⁶ It is unclear how such contacts could have ameliorated the situation. They did not help the *Roamer One* applicant get its application filed on time. In fact, Applicant’s counsel was aware of contacts with Commission staff attempted by counsel for other parties during the extended filing window that resulted in absolutely no beneficial effect.

⁵ 17 FCC Rcd, at 3291.

⁶ Reconsideration Order, at 3.

The Bureau also commends the *Roamer One* applicant for getting the paper application on file only two days after the filing window closed. As explained above, Applicant was unable to even produce a paper version of its application for two days because the only copy available was on the FCC's system, which was shut down. Applicant's paper copy was submitted a mere five business days after its application was available for printing on paper – three more days than was used by the *Roamer One* applicant. Considering that Applicant's counsel was required to travel out of town during this period as well as prepare and file the paper application, this was not an unreasonable delay bespeaking a lack of diligence.

Finally, the Bureau says that *Roamer One* was distinguishable because the agency had already extended the filing window from October 19 to October 22.⁷ In the Waiver Order, the Bureau attempted to absolve itself of responsibility under *Roamer One* by asserting that it “amply corrected for any technical difficulties by extending the filing window two and one-half days.”⁸ This would only be a successful absolution if the filing system had in fact been operational during that extended period as promised. Operations during the extended period remained degraded and problematic. The Bureau completely fails to recognize the importance of fulfilling its commitment to provide trouble-free facilities during the promised remedial period. When the Commission said that the filing window would be open until 2 p.m. on October 22, every would-be applicant had a right to expect that it could use the system continuously and at any time until the closing instant.

⁷ Reconsideration Order, at 3.

⁸ Waiver Order, at 13067, n. 13.

The Bureau glosses over this with an admonition that applicants should have attempted to file early.⁹ It is irrelevant to observe that an applicant could have successfully filed earlier in the filing window. If the Bureau did not intend the filing facilities to be usable for the entire period, it should not have invited applicants to submit applications any time during the allegedly open window.

The Bureau observed that 830 applications were successfully filed during the last seven hours of the filing window.¹⁰ The Bureau takes this as an indication that the system was working properly. However, to the contrary, it shows that degraded system capabilities from earlier in the weekend led to massive congestion at the end of the filing window, which had the effect of further degrading service during that critical time.

In the Waiver Order, the Bureau asserted that to waive the filing window deadline would harm the integrity of the filing window process.¹¹ However, the integrity of the filing window process remains in doubt as long as the system does not allow parties equal access. Petitioner made a good-faith effort to file its application through the prescribed process. It was thwarted in that effort by the system outages. Other applicants using the system at different times during the announced filing period were successful in submitting their applications – largely due to the fact that the online system was functioning properly, or more nearly so, when they stepped up to the bat. Similar parties went through the same process but received differing treatment from the Commission's online facilities. The filing window should not be operated like a roulette table.

⁹ Waiver Order, at 13066.

¹⁰ Waiver Order, at 13067.

¹¹ Waiver Order, at 13067.

To the extent the Commission fails to redress the injury caused by that operation, it jeopardizes the integrity of its entire process.

The Bureau expressed its fear of the prospect that an applicant filing late would have an unfair opportunity to achieve comparative advantage over its competitors.¹² Applicant agrees that gamesmanship must be prevented. However, this is a pointless worry in this case. Applicant's application was uploaded to the CDBS system prior to the close of the filing window. Commission staff can verify this internally. The Petition for a waiver was filed on October 31, 2007. As of that date, none of the applications filed during the October 2007 filing window had yet been made available for public review. Since that time, Applicant's application has remained unchanged in the CDBS account where it was first created. No comparative upgrading has occurred. Again, Commission staff can confirm this internally.

Aside from the issue of the performance of the online filing system, there is another basis for granting a waiver of the filing deadline that was set for 2:00 p.m. on October 22, 2007. Section 1.4(f) of the Commission's rules specifies that electronic filings must be submitted by midnight on the filing deadline date. In setting 2:00 p.m. as the close of the filing window, the Bureau disregarded this rule. In extending the filing window, it should have done so until midnight of the last day, rather than arbitrarily announcing some other hour. Staff compliance with this agency rule would compel a waiver to permit additional time to complete an electronic filing such as Applicant's application. The Bureau rejected Applicant's assertion on this point with the finding that Applicant "failed to cite any precedent showing that this finding was in

¹² Reconsideration Order, at 3-4.

error.”¹³ Applicant does not have the burden to cite any such precedent. Rather, the Bureau has the burden to comply with the Commission’s rules as written. It does not have authority to rewrite regulations.

The Commission paid lip service to the oft-cited principle enunciated in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C.Cir. 1969) that the agency must give a “hard look” to each request for a waiver of its rules. However, the waiver denials announced in the Waiver Order appear to be more arbitrary than carefully reviewed. In addition to the issues of equity and fair treatment for Applicant, there is substantial public interest value in securing the integrity of the filing window system. It is important for the public to have confidence that the FCC’s processes operate transparently, fairly and efficiently. The FCC must treat all similarly situated applicants equally and fairly. As the Court of Appeals said in *Green Country Mobilephone, Inc. et al., v. FCC*, “A sometimes-yes, sometimes-no, sometimes-maybe policy of [deadlines] cannot . . . be squared with our obligation to preclude arbitrary and capricious management of [an agency’s] mandate.” 765 F.2d 235, 237 (D.C.Cir. 1985). The Media Bureau is compelled to bring its action in this case into accord with the Commission’s binding precedent in *Roamer One*.

Before electronic online filing was invented, all filings to the FCC were on paper and had to be delivered to the Office of the Secretary by the close of business on the deadline date to be considered timely filed. The close of business and the filing deadline in those days was 5:30 p.m. At the Secretary’s office in the Commission’s previous headquarters building at 1919 M Street, the counter for receiving incoming filings was in a small room on the second floor. Sometimes, the crowd of individuals seeking to submit filings was greater than the small room could

¹³ Reconsideration Order, at 3.

accommodate. The result was a line that led down the hall. Anyone who got in that line at any time up to 5:30 was allowed to submit his or her filing(s), even though he or she was not physically within the appointed room at the appointed time. Even when there were 100 people in the line, the clerk would accommodate all of them – even if it meant that some of the documents were not actually received until 5:45 or 6:00. The situation that developed in the early afternoon on October 22, 2007 with respect to the NCE FM filing window is analogous. Many parties, including Applicant, were in the electronic line attempting to complete their submissions before the announced deadline. The Commission's physical facilities – i.e., the online filing system – were not capable of accommodating the crowd. Instead of fairly accepting the filings of anyone who was legitimately in line at 2:00, the Commission's system blindly and arbitrarily closed down and prevented those filings that it could have otherwise received were the agency facilities up to the task. The Bureau has petrified this blind arbitrariness in its Waiver Order and Reconsideration Order.

Applicant has acted in good faith and with reasonable due diligence to prepare and file its application. That filing was not completed because the FCC's online system failed to operate normally during the filing window. Commission precedent, principles of equity and the public interest all require that the Waiver Order and the Reconsideration Order be vacated, Applicant's request for a waiver of the filing deadline be granted and that its application be accepted *nunc pro tunc* as if it had been filed during the window.

Respectfully submitted,

TOTALLY JESUS NETWORK, INC.

By: 
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September 9, 2011

CERTIFICATE OF SERVICE

I, Donald E. Martin, hereby certify this 9th day of September, 2011, that I have caused a copy of the foregoing document to be served by United States first class mail upon the following:

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A handwritten signature in cursive script, appearing to read "Donald E. Martin", written in black ink.

Donald E. Martin