

2596.007
BROWN

STAMP AND RETURN

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

FILE COPY

In re Application of)
)
TOTALLY JESUS NETWORK, INC.) File No. BNPED-
) Facility ID No. 175729
For a Construction Permit for a)
New Noncommercial Educational)
FM Station at Gold Beach, OR)

FILED/ACCEPTED

SEP 23 2011

Federal Communications Commission
Office of the Secretary

TO: Secretary, Federal Communications Commission
ATTN: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

UCB USA, Inc. ("UCB"), permittee of a construction permit for a new non-commercial educational ("NCE") FM station at Brookings, OR,¹ by its attorneys and pursuant to Section 1.115(d) of the Commission's rules, hereby opposes the September 9, 2011 *Application For Review* filed by Totally Jesus Network, Inc. ("TJN") with respect to TJN's above-captioned application for a NCE FM station at Gold Beach, OR ("Gold Beach Application").

As discussed below, TJN's *Application For Review* seeks review of the Media Bureau's ("the Bureau") August 10, 2011 letter decision (the "*Letter Decision*")² denying two separate petitions for reconsideration filed by TJN with respect to the Gold Beach Application, which was filed *nine* days after the close a *previously extended* October 2007 filing window and on *paper* rather than in the electronic format required. In pertinent part, the *Letter Decision* denied:

¹ File No. BNPED-20071018AON (Fac. ID No. 172931).

² Copy attached hereto as Exhibit 1.

- (i) TJN's November 18, 2010 *Petition For Reconsideration* of the Bureau's dismissal of TJN's Gold Beach Application and denial of TJN's request for waiver of the relevant window deadline; and
- (ii) TJN's July 31, 2008 *Petition For Reconsideration* of the Bureau's grant of UCB's timely electronically-filed application for a new NCE FM station at Brookings, OR, which TJN had claimed should have been comparatively considered with TJN's Gold Beach Application notwithstanding the lateness and improper paper submission of the Gold Beach Application.

In opposition thereto, the following is respectfully shown:

Background

This matter stems from the October 2007 filing window for applications for NCE FM stations ("the Window"). The Window was announced by a Public Notice³ released six months in advance, in April 2007. That Public Notice also announced the requirement to file all applications in the Window electronically⁴.

The Window was originally scheduled to open on October 12, 2007 and close on October 19, 2007⁵, but Bureau on its own motion extended the Window by two-and-a-half days, until 2 P.M. EDT on October 22, 2007,⁶ citing a six-and-one-half hour outage in the Bureau's CDBS electronic filing system on October 19, 2007, during the early-morning pre-business hours between 1:30 a.m. and 8:00 a.m.

³ FCC Public Notice, "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," DA 07-1613, 22 FCC Rcd 6726 (MB, dated April 4, 2007 ("April 2007 NCE FM Window Announcement").

⁴ *Id.* at para.2.

⁵ *Id.*

⁶ FCC Public Notice, "Media Bureau To Extend Window for NCE FM New Station and Major Change Application; Window Will Close on October 22, 2007," DA 07-4355, 22 FCC Rcd 18680 (MB, dated October 19, 2007).

Ultimately, more than 3,600 applications were successfully electronically filed during the window, as extended,⁷ including UCB's Brookings application.

TJN's Gold Beach Application was not filed during the Window, even as extended. Rather, TJN's Gold Beach Application was filed on October 31, 2007 – *nine* days after the October 22, 2007 close of the *extended* Window (*twelve* days after the originally scheduled deadline). Moreover, TJN's Gold Beach Application was filed on *paper*, rather than electronically. TJN's untimely paper proffer of the Gold Beach application was accompanied by a waiver request seeking acceptance.⁸ Before the Commission is now TJN's *Application For Review of the Letter Decision*, which denied TJN's November 18, 2010 *Petition For Reconsideration* of the Bureau's denial of TJN's waiver request and concomitant dismissal of TJN's Gold Beach Application,⁹ and also dismissed TJN's separate July 31, 2008 *Petition For Reconsideration* of action by the Bureau's Audio Division granting UCB's Brookings application and denying TJN's *Petition to Deny* UCB's Brookings application.¹⁰

UCB herein responds to the three questions TJN presents in its *Application For Review*.

⁷ FCC Public Notice, Report No. 26612, dated November 14, 2007.

⁸ *Petition For Waiver and Acceptance of Application*, "Fac. ID 175729, filed October 31, 2007 ("*Petition For Waiver*").

⁹ TJN's Gold Beach Application was one of number of applications dismissed in an omnibus *Public Notice*, "*NCE FM New Station and Major Change Applications Dismissed For Failure To Timely File*," DA 10-1724, 25 FCC Rcd 13065, released September 13, 2010, as corrected by *Erratum* released October 19, 2010, dismissing applications that had been late-filed and/or paper filed with petitions for waiver of the Window deadline. UCB filed an opposition to TJN's November 18, 2010 *Petition For Reconsideration*, and TJN replied.

¹⁰ TJN's December 14, 2007 *Petition To Deny* UCB's Brookings application did not claim that there was any deficiency in UCB's Brookings application; rather, TJN argued that its nine-day-late improperly paper-filed application should be deemed mutually exclusive with UCB's timely electronically-filed Brookings application and comparatively considered. UCB filed an opposition and TJN replied. The Bureau's Audio Division denied TJN's *Petition To Deny* and granted UCB's Brookings application by letter dated June 26, 2008 (copy attached hereto as Exhibit 2).

UCB's Response to TJN's Question 1:

“Whether the Bureau’s action in denying [TJN’s] waiver request was contrary to binding precedent in the Commission’s decision in *Roamer One, Inc.*, 17 FCC Rcd. 3287 (2002).”

UCB respectfully takes issue with TJN’s suggestion that the Commission’s 2002 decision in *Roamer One, Inc.* (“*Roamer One*”) should be deemed a “binding precedent” in the instant matter. *Roamer One* involved a 1996 filing window, in the early days of the Commission’s use of electronic filing, and the *Roamer One* Commission expressly noted that the filing window involved “a recently introduced system” that the Commission was attempting to encourage licensees to use.¹¹ In contradistinction, by the time the Window in the instant matter opened in October 2007, electronic filing was being used virtually universally for filing FCC applications, and the Commission had acquired some eleven years experience dealing with online filing issues. In view of these critical changes over the passage of time, UCB respectfully urges the Commission to take this opportunity to declare that the rationale underlying *Roamer One* has become obsolete and no longer justifies waivers of filing windows based on electronic filing difficulties.

Moreover, the *Letter Decision* correctly recognized critical distinctions between *Roamer One* and the facts at hand. The *Roamer One* applicant was found to have “acted with reasonable diligence by keeping in constant contact with the Commission’s staff” and managed to complete all electronic filings within two days following that window’s close.¹² TJN, on the other hand, admits in the *Application For Review*¹³ that on October 25, 2007, just a couple of days after the October 22, 2007 Window deadline, without having completed submission of the Gold Beach Application, its counsel “left on a

¹¹ *Roamer One*, *supra* at para.9.

¹² *Roamer One*, *supra* at para. 11.

¹³ *Application For Review* at p.3.

previously-scheduled business trip for the remainder of the week”, and TJN did not make its paper proffer of the Gold Beach Application until October 31, 2007, after its counsel returned from that trip.¹⁴ There is no evidence of record as to whether TJN ever explored alternative methods of proffering its Gold Beach Application, after the close of the Window but prior to TJN’s counsel’s return from his trip.¹⁵

A further distinction noted in the *Letter Decision* is that TJN, in its waiver request and its various petitions, failed to submit any objective evidence whatsoever to corroborate its self-serving claims that the delay in proffering its Gold Beach Application was in fact due to electronic filing difficulties. TJN submitted no documentary evidence of CDBS problems, such as print-outs of CDBS error messages or copies of e-mailed communications with the CDBS Tech Support staff, and provided no details such as dates and times and descriptions of application-specific difficulties. The Bureau previously has refused to excuse late CDBS filings blamed on alleged CDBS difficulties in the absence of hard evidence documenting the alleged CDBS problems.¹⁶ Accordingly, the *Letter Decision* properly recognized that TJN (and the other petitioners) failed to establish that CDBS difficulties in fact caused the late filings.

In any event, the record reflects that the Bureau afforded *all* Window applicants relief that actually *exceeded* the relief deemed appropriate in *Roamer One*. In *Roamer One*, the Commission determined that the applicant’s substantiated electronic filing difficulties justified a two-day waiver of the applicable deadline. In the October 2007

¹⁴ *Application For Review*, p. 3.

¹⁵ The long-standing court precedent under *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) precludes TJN from offering further evidence at this juncture (a party may not “sit back and hope that a decision will be in its favor and, when it isn’t, parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”).

¹⁶ *Union-Carolina Broadcasting Co., Inc.*, DA 07-3503, released August 2, 2007 (copy attached hereto as Exhibit 3).

Window, the Bureau on its own motion extended the originally announced filing deadline two-and-a-half days. TJN's request that its Gold Beach Application be accorded a waiver of nine days after the already extended Window is without precedent.

For all these reasons, the Bureau properly declined to apply *Roamer One, Inc.* as a precedent in the instant case.

UCB's Response to TJN's Question 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.”

TJN's reference to Section 1.4(f) of the Commission's rules, which specifies a general electronic filing deadline of midnight, is a red herring. TJN submitted no evidence that it made any attempts to electronically file the Gold Beach Application by midnight of October 22, 2007. The only evidence of record shows that TJN did not make its Gold Beach paper proffer until October 31, 2007 -- nine days after the October 22, 2007 extended Window closing. Even if, *assuming arguendo*, the Bureau had erred by establishing an electronic filing deadline at a time other than midnight, there would be no legal nexus between the 2 P.M. close of the October 22, 2007 extended filing deadline and either TJN's delay until October 31, 2007 in proffering it's a paper copy of TJN's Gold Beach Application or the Bureau's rejection of TJN's late-filed paper proffer.

In any event, the Media Bureau has authority under Section 0.401(a)(iii) of the rules to specify how electronic media applications must be transmitted, and the Bureau has routinely established electronic filing window deadlines at times other than midnight.

For instance, the Bureau regularly establishes electronic filing window deadlines for Form 175 short-form applications at times other than midnight.¹⁷

UCB's Response to TJN's Question 3:

“Whether the Bureau’s action in denying [TJN’s] waiver request was arbitrary and capricious.”

It is the Commission’s policy to adhere strictly to deadlines in filing windows. *FCC Overrules Caldwell Television Associates, Ltd.*, 58 RR2d 1706 (1984) (“*Caldwell Overruled*”). *Caldwell Overruled* makes clear that applicants will not be granted waiver of a filing window deadline unless satisfying a two-prong showing of:

- (1) clearly unforeseeable circumstances that are unusual or compelling; and
- (2) demonstration that all reasonable steps have been taken to minimize any delay caused by the unforeseeable events.

It cannot be claimed that the possibility of electronic filing difficulties during the October 2007 Window was unforeseeable, or unusual and compelling. The Media Bureau had expressly cautioned potential Window applicants to submit their applications early to ensure proper submission.¹⁸ TJN’s decision attempt to submit the Gold Beach Application at the eleventh hour was at its own risk. *Caldwell Overruled* mentioned such widespread catastrophes as “a debilitating earthquake or a city-wide power outage which

¹⁷ See e.g. *FCC Public Notice, “AM Auction Filing Window and Application Freeze,”* DA 99-2585, 14 FCC Rcd 19490 (released November 19, 1999) (5:30 PM electronic filing deadline); *FCC Public Notice, “Auction Notice and Filing Requirements For FM Broadcast Construction Permits,”* DA 01-119, 16 FCC Rcd 928 (released January 19, 2001) (6 PM electronic filing deadline); *FCC Public Notice, “Auction Of FM Broadcast Construction Permits,”* DA 05-1598, 20 FCC Rcd 10492 (released June 17, 2005) (6 PM electronic filing deadline); *“Auction Of FM Broadcast Construction Permits,”* DA 06-2248, 21 FCC Rcd 12957 (released November 2, 2006) (6 PM electronic filing deadline); *“Auction Of FM Broadcast Construction Permits,”* DA 09-810, 24 FCC Rcd 4445 (released April 17, 2009) (6 PM electronic filing deadline); *“Auction Of FM Broadcast Construction Permits,”* DA 10-2253, 25 FCC Rcd 16787 (released December 3, 2010) (6 PM electronic filing deadline).

¹⁸ *FCC Public Notice, “Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-October 19, 2007 Window,”* DA 07-3521, 22 FCC Rcd 15050, 15053-5 (released August 9, 2007).

brings transportation to a halt” as the sort of circumstances that might satisfy the “clearly unforeseeable” standard. In contradistinction, TJN’s claimed computer filing problems are more along the lines of “copying machine” difficulties that *Caldwell Overruled* expressly warned would be rejected.¹⁹

Nor can TJN reasonably blame its failure to timely electronically file the Golden Beach Application on “a factor uniquely under the Commission’s control,”²⁰ in view of the 3,600 applications that were successfully electronically filed during the Window, as extended.²¹

Further, the record shows that, not only did TJN fail to “take all reasonable steps to minimize delay,” it actually *exacerbated* the delay in making its post-Window proffer of the Gold Beach Application by awaiting its counsel’s return from an out-of-town trip shortly after the Window closed, rather than seeking alternative methods to facilitate an earlier post-Window filing.

It is axiomatic that the Commission must treat similarly-situated parties similarly. *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). In at least one Bureau decision published prior to the *Letter Decision*, and under circumstances strikingly similar to the circumstances of the instant case, the Bureau rejected a late-filed application in the October 2007 Window and refused to set aside the grant of a timely electronically-filed application claimed to be mutually exclusive. *Holy Family Oratory of St. Philip Neri*, 23 FCC Rcd. 11052 (MB 2008) (“*Holy Family Oratory*”) (review

¹⁹ *Caldwell Overruled*, *supra* (“The Commission will no longer consider as unusual or compelling, however, requests for waiver based on claims that copying machines, delivery services or even, in most cases, inclement weather or illness, was responsible for the tardy filing. Although these circumstances may be unexpected, they are reasonably foreseeable and therefore applicants should allow enough time to meet cutoff deadlines to account for such unanticipated delays. In other words, in the future, applicants who wait until the eleventh hour to meet Commission deadlines will be held to assume the risk for almost all events which may occur to prevent timely filing.”).

²⁰ *Application For Review* at p.4.

²¹ See note 7 above.

pending). UCB respectfully submits that it would have been arbitrary and capricious for the Bureau to *depart* from the Bureau policy articulated in *Holy Family Oratory* in the instant case, absent a Commission pronouncement in the interim.

As a final matter, TJN's reliance on *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985) (*Green Country*), is entirely inapposite. The first attempt to file the applications involved in *Green Country* was a mere *three minutes* late, and ultimately the *Green Country* applications were filed early the following morning, as opposed to the *nine-day* lateness of TJN's Gold Beach Application. Further, the court in *Green Country* noted that "the FCC is not required to bend its deadlines at all," and noted that while the Commission's earlier decision in *Caldwell Television Associates, Ltd.*, 53 RR 2d 1686 (1983) ("*Caldwell*") (waiver of filing deadline for a one-day late application) remained law, it was constrained to rule in favor of waiver. Ultimately the FCC abolished *Caldwell* to announce a future policy to adhere strictly to filing deadlines and bar filing deadline waivers absent demonstration of clearly unforeseeable unusual and compelling circumstances and a showing that all reasonable steps were taken to minimize filing delays caused by such unforeseeable unusual and compelling events²².

Conclusion

The Commission has repeatedly stated that strict adherence to filing deadlines is required to permit the Commission to begin processing a defined group of applications at a specific time without the specter of facing numerous waiver requests.²³ While TRN cites *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*") for the

²² *Caldwell Overruled*, *supra*. See also pp. 7-8 herein.

²³ *Roamer One*, *supra* at para. 8, citing *Caldwell Overruled*, *supra*, *First Auction of Interactive Video and Data Service*, 11 FCC Rcd 1134 (1996), and *Mary R. Kurpis*, 5 FCC Rcd 5142 (1990) ("Although we understand that difficulties are sometimes encountered by parties trying to meet those deadlines, a strict policy as to the official close of business avoids confusion, establishes consistency and treats fairly all parties that are similarly situated").

proposition that an agency must give a “hard look” to waiver requests, in *WAIT Radio* the court also cautioned that an applicant seeking waiver “faces a high hurdle even at the starting gate”²⁴ and must “plead with particularity the facts and circumstances” warranting waiver.²⁵ As noted above, TJN failed to provide any specific details or hard evidence of the CDBS difficulties it claims to have encountered in attempting to file its Gold Beach Application. Moreover, notwithstanding TJN’s generalized complaints about electronic filing problems, ultimately some 3,600 applications were timely electronically filed during the extended Window. Some of those applications, including UCB’s timely and electronically-filed Brookings application, have since been granted. Retaining the strict policy regarding filing window deadline waivers is essential to fair treatment of those who managed to electronically file their Window applications in a timely manner.

WHEREFORE, the premises considered, it is respectfully submitted that the *Application For Review* filed by Totally Jesus Network, Inc. with respect to the above-captioned Gold Beach Application should be denied, and the Bureau’s *Letter Decision* should be affirmed.

Respectfully submitted,

UCB USA, INC.

By *Ellen Mandell Edmundson*

Ellen Mandell Edmundson
Cohn and Marks LLP
1920 N Street NW – Suite 300
Washington, DC 20036
(202) 293-3860
Its Attorney

Dated: September 23, 2011

²⁴ *WAIT Radio*, *supra* at para.2.

²⁵ *Id.*



Federal Communications Commission
Washington, D.C. 20554

August 10, 2011

In Reply Refer To:
1800B3-ATS

Donald E. Martin, Esq.
Donald E. Martin, P.C.
P.O. Box 8433
Falls Church, VA 22041

Jerold L. Jacobs, Esq.
Cohn and Marks LLP
1920 N St., N.W., Suite 300
Washington, DC 20036

In re: Bishop Wilfret Johnson Ministries
International, Inc.
New NCE (FM), Pointe A La Hache,
Louisiana
Facility ID No. 174973

Cross to Crown International, Inc.
New NCE (FM), Dayton, Tennessee
Facility ID No. 175690

Mountaintop Ministries, Inc.
New NCE (FM), Midvale, Idaho
Facility ID No. 176101

Orosi Seventh-day Adventist Church
New NCE (FM), London, California
Facility ID No. 175180

Roswell Seventh-day Adventist Church
New NCE (FM), Roswell, New Mexico
Facility ID No. 174464

Totally Jesus Network, Inc.
New NCE (FM), Gold Beach, Oregon
Facility ID No. 175729

Petitions for Reconsideration

Dear Counsel:

We have before us: (1) six Petitions for Reconsideration (collectively, "Petitions") filed separately by Bishop Wilfret Johnson Ministries International, Inc.; Cross to Crown International, Inc.; Mountaintop Ministries, Inc.; Orosi Seventh-day Adventist Church; Roswell Seventh-day Adventist Church; and Totally Jesus Network, Inc. ("Petitioners"), seeking reconsideration of a September 2010 Public Notice¹ dismissing their respective applications.² For the reasons set forth below, we deny the Petitions.³

¹ *NCE FM New Station and Major Change Applications Dismissed for Failure to Timely File*, Public Notice, 25 FCC Rcd 13065 (MB 2010) ("Public Notice").

Background. As discussed in the *Public Notice*, on April 4, 2007, the Media Bureau ("Bureau") announced a filing window for new NCE FM station and major modification construction permits and designated October 19, 2007, as the deadline for electronically filing a complete FCC Form 340 application. Following a six and one-half hour outage of the Bureau's electronic filing system, CDBS, on October 19, 2007, the Bureau extended the filing window until October 22, 2007 at 2 p.m. EDT. On October 31, 2007, Petitioners each filed a paper application for a new NCE station, along with a request for waiver of the filing deadline. In support of their waiver requests, they claimed that they continued to experience technical problems with CDBS during the extended window, including a two-hour outage on the morning of October 22, 2007.

In the *Public Notice*, the Bureau found that the technical problems Petitioners may have experienced with CDBS during the extended window did not justify a waiver of the filing deadline, and dismissed their applications accordingly. Petitioners claim that the Bureau's denial of their waiver requests was arbitrary and an abuse of the Commission's discretion.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.⁴ The Petitioners have failed to meet this burden.

Petitioners first argue that the *Public Notice* is inconsistent with the Commission's holding in *Roamer One, Inc.*⁵ They claim that the Commission failed to "provide trouble-free facilities during the promised remedial period" and therefore should have granted the waiver requests, as it had done in *Roamer One*. As an initial matter, we find that the Petitioners, in both their waiver requests and in their instant Petitions, fail to establish that CDBS difficulties caused their late filing. First, as noted in the *Public Notice*, over 830 applications were successfully filed during the last seven hours of the extended window.⁶ Thus, it appears that CDBS was functioning properly for the vast majority of applicants.

(Continued from previous page)

² Bishop Wilfret Johnson Ministries International, Inc. ("BWJM"); Cross to Crown International, Inc.; Mountaintop Ministries, Inc.; Orosi Seventh-day Adventist Church; and Roswell Seventh-day Adventist Church timely filed their respective petitions on October 13, 2010. Totally Jesus Network, Inc. ("TJN") was mistakenly excluded from the *Public Notice*. An erratum was issued on October 19, 2010, correcting the *Public Notice* and dismissing TJN's application. TJN timely filed its petition on November 18, 2010. UCB USA, Inc. ("UCB") filed an Opposition on December 2, 2010. TJN filed a Reply on December 14, 2010. Although the Petitions were filed separately, they raise identical substantive issues and so we will address them collectively.

³ A Petition for Reconsideration ("July 2008 Petition") was filed on July 31, 2008, by TJN seeking reconsideration of our June 26, 2008, letter decision granting UCB's application (File No. BNPED-20071018AON) for a construction permit for a new NCE station at Brookings, Oregon. *UCB USA, Inc.*, Letter, Ref. 1800B3 (MB June 26, 2008). UCB filed an Opposition on August 11, 2008. TJN filed a Reply on August 20, 2008. Because we are denying TJN's petition for reconsideration of the dismissal of its application, the July 2008 Petition is moot and we will dismiss it below.

⁴ See 47 C.F.R. § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966), and *In re National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

⁵ Petitions at 3, citing *Roamer One, Inc.*, Order, 17 FCC Rcd 3287 (2002) ("*Roamer One*").

⁶ *Public Notice*, 25 FCC Rcd at 13067. Moreover, the success of these applicants in filing their applications suggests that Petitioners' alleged technical difficulties with CDBS were not attributable to the fault of the Commission. The Commission has held that third-party difficulties are not cause for waiver of a deadline. See *CGG Veritas Land, Inc.*, Memorandum Opinion Order, 26 FCC Rcd 2493 (2011) (finding waiver of deadline for filing of petitions for reconsideration was not warranted where petitioners, who had attempted to file their petition minutes before the deadline, experienced difficulties with their internet service provider and were unable to file until the next day).

However, even assuming that CDBS was sluggish due to the high volume of filing activity, *Roamer One* is distinguishable from the facts at hand. There, the Commission granted waiver of a filing deadline when an applicant reported technical difficulties with the Commission's electronic filing system and subsequently completed its filings within two days of the close of the filing window.⁷ In granting the waiver, the Commission emphasized that the applicant "acted with reasonable diligence by keeping in constant contact with the Commission's staff" during its attempts to electronically file, and filed its waiver requests in the "immediate period following the deadline." Here, we have no record of Petitioners' efforts to work with Commission staff when they were allegedly experiencing difficulties with CDBS. Moreover, Petitioners waited more than *one week* after the close of the extended window to file their waiver requests and applications. Finally, unlike in *Roamer*, the Commission in this case had already extended the filing deadline to compensate for any electronic filing difficulties. Petitioners here simply waited until the last minute of the extended deadline to file their applications, despite the Commission's encouragement to file early in the window.⁸

Petitioners next argue that under Section 1.4(f)⁹ of the Rules, the 2 p.m. deadline was inadequate.¹⁰ As noted in the *Public Notice*, Section 1.4(f) does not preclude the Bureau from establishing a deadline before midnight on the filing date.¹¹ Petitioners have failed to cite to any precedent showing that this finding was in error.

Petitioners finally contend that the Bureau failed to give a "hard look" to their waiver requests as required by *WAIT Radio v. FCC*.¹² We disagree. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.¹³ First, the waiver requests at issue here simply failed to provide enough specific details about the system outages, objective corroborating evidence, or evidence of their efforts to work with Commission staff to resolve their filing issues.¹⁴ Second, as noted in the *Public Notice*, adherence to filing deadlines promotes consistency, predictability and ensures equal treatment of all applicants.¹⁵ Third, in light of the generous extension of the filing window, the staff determined that no waivers of the filing deadline were warranted. Finally, as we noted in the *Public Notice*, consideration of late-filed applications in comparative cases would lead to

⁷ *Roamer One*, 17 FCC Rcd at 3289, 91

⁸ See *Media Bureau Announces NCE FM New Station and Major Changes Filing Window for October 12 - October 19, 2007 Window*, Public Notice, 22 FCC Rcd 15050, 15054 (MB 2007) ("Applicants are encouraged to access the system and prepare their applications at their earliest convenience Applicants are also encouraged to submit their applications early during the window to ensure proper submission.").

⁹ 47 C.F.R. § 1.4(f).

¹⁰ Petitions at 3-5.

¹¹ *Public Notice*, 25 FCC Rcd at 13065, n.1 ("the Bureau has delegated authority to establish and limit the dates and times of the relevant filing window as it sees fit").

¹² Petitions at 6, citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹³ *Id.*

¹⁴ Petitioners' sole justification for the waiver is the alleged underperformance and outage of CDBS during the extended filing period.

¹⁵ *Public Notice*, 25 FCC Rcd at 13067.

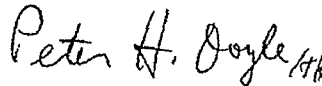
gamesmanship and unfair advantage.¹⁶ Petitioners cite no persuasive authority indicating that the Bureau's decision was in error.

Conclusion/Actions. Accordingly, IT IS ORDERED that the July 31, 2008, Petition for Reconsideration filed by Totally Jesus, Inc., is DISMISSED.

IT IS FURTHER ORDERED that the October 13, 2010, Petitions for Reconsideration filed by Bishop Wilfret Johnson Ministries International, Inc., Cross to Crown International, Inc., Mountaintop Ministries, Inc., Orosi Seventh-day Adventist Church., and Roswell Seventh-day Adventist Church, ARE DENIED.

IT IS FURTHER ORDERED that the November 18, 2010, Petition for Reconsideration filed by Totally Jesus Network, Inc., is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Bishop Wilfret Johnson Ministries International, Inc.
Cross to Crown International, Inc.
Mountaintop Ministries, Inc.
Orosi Seventh-day Adventist Church
Roswell Seventh-day Adventist Church
Totally Jesus Network, Inc.

¹⁶ *Id.*

FEDERAL COMMUNICATIONS COMMISSION

445 12th STREET SW
WASHINGTON DC 20554

JUN 26 2008

MEDIA BUREAU
AUDIO DIVISION
APPLICATION STATUS: (202) 418-2730
HOME PAGE: www.fcc.gov/mb/audio

PROCESSING ENGINEER: Tung Bui
TELEPHONE: (202) 418-2778
FACSIMILE: (202) 418-1410
MAIL STOP: 1800B3
INTERNET ADDRESS: tung.bui@fcc.gov

UCB USA, Inc.
1236 Disk Drive, Suite E
Medford, OR 97501

In re: NEW(FM), Brookings, OR
Facility ID #172931
UCB USA, Inc. ("UCB")
BNPED-20071018AON

Dear Applicant:

This is in reference to: (1) the above-captioned application for a new non-commercial educational FM facility to serve Brookings, OR on Channel 218A; (2) the December 14, 2007 Petition to Deny filed by Totally Jesus Network, Inc. ("TJN"); and (3) all other related pleadings. For the reasons discussed below, we deny the petition to deny and grant the application.

In the petition to deny, TJN argues that processing of UCB's application should be withheld until action is taken on TJN's December 14, 2007 Petition for Waiver and Acceptance of Application ("Petition"). In the Petition, TJN requests the acceptance of its untimely filed application to serve Gold Beach, OR on Channel 218C2. If accepted, TJN believes that its application would be mutually exclusive with the above-captioned application filed by UCB. However, TJN's petition fails to provide any technical reasons for denying UCB's application.

In light of the above, the Petition to Deny filed on December 14, 2007 by Totally Jesus Network, Inc. IS HEREBY DENIED. Furthermore, Application File No. BNPED-20071018AON, being acceptable and grantable, IS HEREBY GRANTED. These actions are taken pursuant to 47 C.F.R. § 0.283.

Sincerely,



Rodolfo F. Bonacci
Assistant Chief
Audio Division
Media Bureau

cc. Ellen Mandell Edmunson, Esq.
Donald E. Martin, Esq.



Federal Communications Commission
Washington, D.C. 20554

August 2, 2007

DA 07-3503

In Reply Refer to:

1800B3-TSN

Released: August 2, 2007

Union-Carolina Broadcasting Co., Inc.
P.O. Drawer E
Toccoa, GA 30577

In re: **AM Broadcast Auction No. 84**

Union-Carolina Broadcasting Co., Inc.
WBCU(AM), Union, South Carolina
Facility ID No. 7088
File No. BMJP-20040126APL

**Application for Major Modification to
AM Broadcast Station**

Dear Applicant:

We have before us a Petition for Reconsideration ("Petition") filed April 7, 2005, by Union-Carolina Broadcasting Co., Inc. ("Union"). Union applied in the AM Auction No. 84 ("Auction 84") filing window for a major modification to the facilities of its station WBCU(AM), Union, South Carolina, specifically seeking to change frequency from 1460 kHz to 690 kHz and move its transmitter site, in order to provide greater signal coverage. For the reasons stated below, we deny Union's Petition.

Background. Union's application was listed in a Public Notice of singleton (non-mutually exclusive) applicants who filed Form 175 short-form applications in the filing window for AM Broadcast Auction No. 84.¹ According to the *Singleton Filing Public Notice*, those applicants listed were to file Form 301 long-form applications between November 18, 2004, and January 18, 2005.² Additionally, the Media Bureau ("Bureau") cautioned that "[t]he staff will dismiss, without further processing, a previously filed Form 301 tech box submission of any applicant listed [in the Singleton Filing Public Notice] that fails to submit the complete FCC Form 301 by January 18, 2005."³ Union did not timely file a complete Form 301, and its filing window tech box submission was accordingly dismissed.⁴

¹ *AM Auction No. 84 Singleton Applications – Media Bureau Announces Form 301 Application Deadline and Ten-Day Petition to Deny Period*, Public Notice, 19 FCC Rcd 22569, 22573 (MB 2004) ("*Singleton Filing Public Notice*").

² *Id.* at 22569.

³ *Id.* at 22571.

⁴ *AM Auction No. 84 Singleton Applications Dismissed for Failure to File*, Public Notice, 20 FCC Rcd 5109 (MB 2005).

Discussion. Union claims that it uploaded the complete Form 301 almost 24 hours before the filing deadline, and believed it had been filed, but that it discovered two weeks later that the Bureau's Consolidated Data Base System ("CDBS"), through which applications are electronically filed, "did not recognize the application as having been timely filed."⁵ Specifically, Union states that its counsel is well acquainted with CDBS electronic filing and that, because "[a]ll other applications filed that evening were filed, received and processed by the FCC correctly, the only logical explanation that exists is that some unknown snafu occurred, beyond the control of the applicant or its counsel, that interfered with the Commission's receipt of the application."⁶

Union seeks waiver of the filing deadline in order to file its application. It states that waiver would serve the public interest, as WBCU(AM) is the only station licensed to and serving Union County, South Carolina, and that service would be enhanced by the frequency change and site change Union seeks in its application. Union also states that waiver "will do no harm to the Commission's processes or the public interest."⁷ The combination of probable Commission error and lack of prejudice, argues Union, warrants waiver of the Form 301 application filing deadline.

We disagree. Waiver of our rules is appropriate when special circumstances warrant deviation from the general rule, and that deviation would serve the public interest.⁸ We find no special circumstances here. In several places, Union concludes that a CDBS "glitch" resulted in the failure of its Form 301 to be filed. However, Union fails to provide any evidence that the Commission was responsible for its failure to timely file its Form 301 application. There is no declaration from the individual responsible for filing the Form 301 application detailing the steps he or she took to assure proper filing. Significantly, Union provides no copy of the on-screen notice confirming that the Form 301 was successfully received for processing. In fact, a search of the CDBS filing database indicates that, while Union initiated the filing process for its Form 301 application, and completed validation checks, it did not complete the filing process. On the other hand, Union concedes that other applications were successfully filed during that time period.⁹ Given the lack of any evidence from Union detailing the filing process it undertook, or indicating that it received confirmation of successful filing, we can only conclude that it was Union that was responsible for the failure to file its Form 301 application within the 60-day window established in the *Singleton Filing Public Notice*, rather than some unspecified "glitch" in CDBS.

Union points to three cases to support its contention that Commission practice in auction cases is to be lenient in allowing late filing of long-form applications: *City Page & Cellular Services, Inc., et al.*;¹⁰ *Silver Palm Communications*;¹¹ and *Pinpoint Communications, Inc.*¹² In each of these cases, however, the late filers were the high bidders in completed Wireless Telecommunications Bureau

⁵ Petition at 2.

⁶ Petition at 5.

⁷ *Id.*

⁸ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

⁹ Petition at 2.

¹⁰ *City Page & Cellular Services, Inc., et al.*, Order, 17 FCC Rcd 26109 (WTB 2002).

¹¹ *Silver Palm Communications*, Order, 17 FCC Rcd 6606 (WTB 2002).

¹² *Pinpoint Communications, Inc.*, Order, 14 FCC Rcd 6421 (WTB 1999).

(“WTB”) auctions. In those decisions, the WTB placed great emphasis on the fact that the delinquent filers had up to that point complied with all Commission deadlines, including short-form filing, upfront payment, and down payment deadlines. By way of contrast, Union has not undergone an auction process; its only prior act in this instance was timely filing the Form 175 application. Thus, unlike the late filers in the cases it cites, Union has not established a record of timely compliance with Commission auction deadlines.

Union also cites *Roamer One, Inc. and Certain 220 MHz Non-Nationwide Licensees* in support of its waiver request.¹³ *Roamer One* is distinguishable, however. In *Roamer One*, the Commission waived filing deadlines for applicants that experienced difficulties in electronically filing certain 220 MHz base station license modification applications. In so doing, the Commission concluded that it appeared “to be at least partially responsible for technical difficulties associated with the filing of applications,” as opposed to cases in which late filing was due to problems either entirely under the applicant’s control or which were reasonably foreseeable.¹⁴ The Commission also noted that limited waivers were appropriate where filers “initiated the filing in a timely manner, showed reasonable diligence when technical difficulties occurred, and were able to file very shortly after the deadline.”¹⁵ The applicants in *Roamer One* advised Commission staff of their electronic filing difficulties well before the filing deadline, and were advised by staff to file late applications accompanied by waiver requests.¹⁶ Here, by way of contrast, Union did not alert the staff to its filing difficulties until two weeks after the filing deadline.¹⁷ Moreover, as noted above, Union speculates that the Commission was responsible for its filing difficulties without providing any hard evidence to support its claim. We therefore find *Roamer One* to be inapposite.¹⁸

¹³ *Roamer One, Inc. and Certain 220 MHz Non-Nationwide Licensees*, Order, 17 FCC Rcd 3287 (2002) (“*Roamer One*”).

¹⁴ *Id.* at 3291.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Petition at 2.

¹⁸ We also distinguish *Gulf Coast Community College*, Letter, 20 FCC Rcd 17157 (MB 2005) (“*Gulf Coast*”), from the instant case on its facts. *Gulf Coast* was released November 3, 2005, and thus was not cited in Union’s April 7, 2005, Petition. In *Gulf Coast*, applicant Gulf Coast Community College (“GCCC”), like Union, failed timely to file its Form 301 application after being informed that it was a “singleton” Auction 84 applicant, and unsuccessfully attempted to attribute its failure to an unspecified CDBS error. While the Bureau rejected GCCC’s claim of Commission error, it found unique facts that justified waiver of the filing deadline (while imposing an apparent liability for forfeiture of \$3,000). Specifically, GCCC proposed a change of community of license that would provide first local transmission service to Southport, Florida, pleaded the loss of its then-current transmitter site and the inability to find an affordable replacement site that would cover its community of license, and emphasized that the proposed new site was farther inland, and thus less susceptible to damage from the hurricanes that plagued Florida during the summer and autumn of 2005. 20 FCC Rcd at 17158-60. Union does not cite similarly unique or compelling facts justifying the waiver sought. See *supra* note 8.

Conclusion / Action. We find that Union had adequate notice of the 60-day filing window in which it was to file its complete Form 301 application and of the deadline by which it was to file its application. We further find that Union's failure to file its application before the deadline was not the result of Commission error, but rather of Union's own conduct, and find that the public interest would not be served by waiver of the application filing deadline. Accordingly, Union's Petition IS DENIED.

Sincerely,

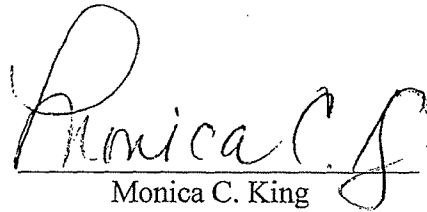
Peter H. Doyle, Chief
Audio Division
Media Bureau

cc: Dan J. Alpert, Esq.

CERTIFICATE OF SERVICE

I, Monica C. King, hereby certify that on this 23rd day of September, 2011, a copy of the foregoing "Opposition to Application For Review" was delivered via first class U.S. mail, postage prepaid, to the following:

Donald E. Martin, Esquire, PC
P.O. Box 8433
Falls Church, VA 22041


Monica C. King