

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Guam Power II)	
)	
Application for a Construction Permit for a New)	File No. BNPT-20180129AIP
FM Translator Station at Agana, Guam,)	Facility ID No. 203028
)	
Holonet Corporation)	
)	
Application for a Construction Permit for a New)	File No. BNPFT-20180129AIQ
FM Translator Station at Garapan-Saipan,)	Facility ID No. 203029
Northern Mariana Islands,)	
)	
and)	
)	
Management Advisory Services, Inc.)	
)	
Application for a Construction Permit for a New)	File No. BPFT-20180130AIT
FM Translator Station at Agana, Guam)	Facility ID No. 203193

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 2018

Released: October 31, 2018

By the Commission:

1. We have before us an Application for Review (AFR) filed jointly by Guam Power II, Holonet Corporation, and Management Advisory Service, Inc. (collectively, Applicants) seeking Commission review of a Media Bureau (Bureau) decision that denied their Petitions for Reconsideration (collectively, Petitions) and affirmed the dismissal of their applications for construction permits for new cross-service FM translator stations (collectively, Applications).¹ For the reasons set forth below, we affirm the Bureau’s denial of the Applicants’ Petitions and deny the AFR.

2. The Applicants filed their FCC Form 349 (Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station) “Tech Box” Applications during the January 2018 Translator Filing Window,² proposing to construct new FM translator stations to rebroadcast AM stations in Guam and the Northern Mariana Islands. On March 15, 2018, the Bureau issued a public notice informing Auction 100 singletons—including the Applicants—that they were required to file their long-form applications during a window open from April 18, 2018, to May 9, 2018 (Application Deadline).³ The Applicants failed to file the required long-form applications during the filing window,

¹ *Guam Power II, Holonet Corporation, and Management Advisory Service, Inc.*, Letter Order, Ref. 1800B3-ATS (MB June 29, 2018) (*Staff Decision*).

² *See Filing Instructions for Second Cross-Service FM Translator Auction Filings Window for AM Broadcasters (Auction 100) to be Open January 25 – January 31, 2018; Freeze on FM Translator and Low-Power FM Station Minor Change Applications and FM Booster Applications January 18 – January 31, 2018*, Public Notice, 32 FCC Rcd 10173 (MB/WTB 2017).

³ *Media Bureau Announces Auction 100 FM Translator Filing Window for Long-Form Applications*, Public Notice, 33 FCC Rcd 2276, 2277 (MB 2018) (*Long-Form PN*) (“[t]he staff will dismiss, without further processing, any Tech

and the Bureau dismissed the Applications on May 10, 2018.⁴

3. The Petitions, filed on May 21, 2018, were essentially identical and therefore were considered jointly by the Bureau. The Petitions claimed that the failure to file the required long-form applications was attributable to a misunderstanding by the Applicants' engineer, who was away for two weeks prior to the Application Deadline; that the AM stations face significant financial difficulties; that the owner is willing to invest in station upgrades contingent on approval of the translator applications; that the translator stations would provide valuable services to their communities, including additional programming and information during emergencies; that reinstatement would be consistent with the Commission's policy of providing FM translators to broadcasters that do not have one in the same market; and that the Applicants need the translators and have not "gamed the system" to gain an unfair advantage over other broadcasters because the Applications were singletons.⁵ The Petitions finally stated "to the degree that any waiver of the Commission's rules is required to reinstate [the Applications], such waiver is hereby respectfully requested."⁶

4. In the *Staff Decision*, the Bureau considered the factors that the Applicants cited as justification for their request to waive the Application Deadline and rejected these factors because they were not special circumstances.⁷ The Bureau specifically held that the Applicants were ultimately responsible for the error of their engineer,⁸ that the challenges faced by the Applicants' AM stations were not unique, but rather common to many AM stations,⁹ and that "the public interest is best served by the fair and consistent application of [the Commission's] licensing rules and procedures."¹⁰ The Bureau thus denied the Petitions.

5. In the AFR, the Applicants argue that the Bureau erred in not granting waivers of the Application Deadline. The Applicants aver that the Bureau did not give their waiver request the required "hard look" and that the *Staff Decision* was "entirely perfunctory," "reli[ed] on presumption rather than analysis" and "lack[ed] explanation."¹¹ The AFR further argues that the *Staff Decision* did not provide "consideration of the rationale or the parameters of the proposed waiver" and criticizes its reliance on the

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Box proposal listed in Attachment A if the applicant fails to electronically submit a complete Form 349 application for such Tech Box proposal by the Application Deadline. The Application Deadline will be strictly enforced.").

⁴ See *Broadcast Actions*, Public Notice, Report No. 49236 (MB May 15, 2018) ("Dismissed 5/10/2018 per [Long-Form PN]. Applicant failed to file required Form 349 by the May 9, 2018 deadline. No letter sent.").

⁵ Petitions at 1-2; see also *Staff Decision* at 2.

⁶ *Id.* at 2.

⁷ *Staff Decision* at 3.

⁸ *Id.* at 3 (citing *Roy E. Henderson*, Memorandum Opinion and Order, FCC 18-36, para. 6 (Mar. 26, 2018) (rejecting argument that licensee's engineer was to blame for station's unauthorized operations); *Gaffney Broad., Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 914, para. 4 (1970) ("licensees are responsible for . . . the acts or omissions of their employees"); *Triad Broad. Co., Inc.*, Memorandum Opinion and Order, 96 FCC 2d 1235, 1244, para. 21 (1984) (issuing forfeiture to licensee for rule violations caused by its attorney's actions and noting that ignorance of attorney's actions was no excuse because "licensee here needed only to exercise better judgment and closer supervision of its counsel"))).

⁹ *Staff Decision* at 3 (citing *Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221, 15222-25, paras. 4-9 (2013)).

¹⁰ *Staff Decision* at 3.

¹¹ AFR at 5.

“unproven assertion” that “the public interest is better served by requiring strict adherence” to Commission rules.¹²

6. As noted in the *Staff Decision*, the Commission’s Rules may be waived only for good cause shown.¹³ The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate”¹⁴ and must support its waiver request with a compelling showing.¹⁵ Waiver is appropriate only if both: (1) special circumstances warrant a deviation from the general rule; and (2) such deviation better serves the public interest.¹⁶

7. Contrary to Applicants’ assertion in the AFR,¹⁷ in the *Staff Decision* the Bureau considered each factor raised in the Petitions and explained its reasoning for its decision. The Bureau gave the waiver requests a “hard look,” and we affirm its decision that there were no special circumstances warranting a waiver of the Application Deadline.¹⁸

8. Additionally, the Applicants failed to show that deviation would better serve the public interest. In this case, the Applicants erroneously failed to file their applications in a timely manner. The Commission has consistently refused to accept applications after the close of a filing window where the failure to timely file was attributed to error or poor planning by applicants’ agents.¹⁹ The Bureau correctly determined that the public interest is best served by denial of the waiver and adherence to the Application Deadline, particularly because the failure to meet the Application Deadline was the fault of the Applicants.²⁰ While the petitioners claim that missing a deadline is a “non-disruptive administrative

¹² *Id.* (citing *Staff Decision* at 3).

¹³ 47 CFR § 1.3.

¹⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). (*WAIT Radio*) (subsequent history omitted).

¹⁵ *Greater Media Radio Co., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999) (citing *Stoner Broad. Sys., Inc.*, Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974)).

¹⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (*NetworkIP*); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁷ AFR at 5.

¹⁸ *NetworkIP*, 548 F.3d at 127 (“before the FCC can invoke its good cause exception, it *both* must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation” (emphasis in original, internal citations omitted)). The AFR does not state why any of the factors identified in the Petitions are in fact “special circumstances” despite the Bureau’s conclusion that they are not. Moreover, the fact that there were no competing applicants is not a special circumstance warranting a waiver in this case in light of Applicants’ error and the adverse effects on the public interest of waiving the deadline, discussed below. See *Centro Cultural de Mexico en el Condado de Orange*, Memorandum Opinion and Order, 31 FCC Rcd 838, 839 n.7 (2016) (*Centro Cultural*) (citing *NetworkIP*, 548 F.3d at 127) (“When an agency imposes a strict deadline for filings, as the FCC has done, many meritorious claims are not considered; that is the nature of a strict deadline. . . . Very few are *that* prejudiced when a filing occurs a day after a deadline (or a week, or a month, or maybe even a year), as opposed to the day of” but deadlines “would devolve into mere suggestion” if they were routinely waived (emphasis in original)).

¹⁹ See, e.g., *Totally Jesus Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 6414 (2014) (rejecting request to submit application for construction permit for new noncommercial educational station after close of filing window where applicant’s counsel waited until last day of filing window, encountered technical issues, and was not able to submit before close of filing window); *Holy Family Oratory of St. Philip Neri*, Letter Order, 23 FCC Rcd 11052 (MB 2008) (same), *aff’d* Memorandum Opinion and Order, 29 FCC Rcd 13273 (2014). See also *Independent Communications, Inc.*, 15 FCC Rcd 7080, 7081 ¶ 6 (1999) (“In order to justify a waiver of an application filing deadline, ‘the application must demonstrate a calamity of such widespread nature that even the best of planning could not have avoided the late filing.’ . . . [C]ounsel’s illness does not support a waiver of the filing window deadline.”) (citation omitted).

²⁰ See *Centro Cultural*, 31 FCC Rcd at 839 n.7 (administrative error is not grounds for waiver of filing deadline).

error” and an “uncommon situation,” we must disagree. Strict deadlines are necessary to the orderly processing of this and any other application window.²¹ If we were required to consider late-filed applications, it would increase the burden on the processing staff and slow the finality of any application window, which delays service to the public.²² Finally, the Petitions failed to substantiate or provide documentation supporting the public interest factors they cited.²³ We thus affirm the *Staff Decision* and deny the AFR.

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 1.115 of the Commission’s Rules, 47 CFR § 1.115, the Application for Review filed by Guam Power II, Holonet Corporation, and Management Advisory Service, Inc. on July 30, 2018 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²¹ See n.18 *supra*.

²² See *Crystal Broad. Partners*, Memorandum Opinion and Order, 11 FCC Rcd 4680, para. 6 (1996) (“Strict adherence to the principle of administrative finality in licensing matters advances the public interest. This policy promotes the prompt initiation of service without undue delay.”).

²³ See Petitions at 1-2 (claims of financial hardship, prospect of improved programming and emergency information, owners’ willingness to invest in upgrades contingent on grant of the waivers, claims regarding electric power rates/extreme weather). See *WAIT Radio*, 418 F.2d at 1157 n.9 (“The agency is not bound to process in depth what are only generalized pleas The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary. . . . [T]he agency is not required to author an essay for the disposition of each application. It suffices, in the usual case, that we can discern the ‘why and wherefore.’”) (citing *Rio Grande Radio Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); see also *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1224 (D.C. Cir. 1999) (“[W]hen an agency receives a request for waiver that is ‘stated with clarity and accompanied by supporting data,’ such requests are not subject to perfunctory treatment, but must be given a hard look.”) (emphasis added, citation omitted).