

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

In the Matter of)	
)	
Channel 61 Associates, LLC)	File No. BRC DT-20150202ABE
)	Facility ID No. 77515
Application for Renewal of License of Television)	
Station WNMN(TV), ¹ Saranac Lake, NY)	

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 2018

Released: February 15, 2018

By the Commission:

1. In this Memorandum Opinion and Order, we dismiss the Application for Review (“AFR”) filed by Convergence Entertainment and Communications, LLC (“Convergence”), challenging the decision by the Media Bureau (“Bureau”) to grant the application of Channel 61 Associates, LLC (“Channel 61” or the “Licensee”) to renew the license of WNMN(TV) (the “Station”), Saranac Lake, New York (the “License”).²

I. BACKGROUND

2. Convergence is the former licensee of WGMU-LP, Burlington, Vermont, which was located in the same Nielsen Designated Market Area, Burlington-Plattsburgh, as the Station.³ Convergence and Channel 61 are parties to a contractual dispute in a New York state court pertaining to the License.⁴ On November 4, 2015, in the *Renewal Order*, the Bureau granted an application to renew the License for WNMN(TV) and adopted a consent decree negotiated by the Bureau and Licensee terminating an investigation by the Division into violations of Commission Rules.⁵ The Bureau concluded that the record did not raise substantial or material questions of fact as to whether the Licensee possessed the basic qualifications to hold a Commission license, and that grant of the application was consistent with Section 309(k) of the Communications Act of 1934, as amended (the “Act”).⁶

3. On April 1, 2016, Convergence filed the AFR alleging, among other things, that the Licensee had filed an application for a license to cover on October 2, 2007, containing material misrepresentations because it had never broadcast a signal pursuant to the technical parameters set forth

¹ On March 9, 2016, WNMN(TV) changed its call sign to WYCI.

² *Channel 61 Associates, LLC*, Order, 30 FCC Rcd 12324 (MB 2015) (“*Renewal Order*”).

³ *Channel 61 Associates, LLC*, Letter Order, 31 FCC Rcd 1340, 1342 (MB Vid. Div. 2016) (“*Assignment Order*”), *reconsideration dismissed*, Memorandum Opinion and Order, 32 FCC Rcd 3806 (MB Vid. Div. 2017) (“*Reconsideration Order*”).

⁴ *Assignment Order*, 31 FCC Rcd at 1341.

⁵ *Consent Decree*, 30 FCC Rcd 12326 (MB 2015) (“*Consent Decree*”). The *Renewal Order* noted that the Licensee failed during some periods of time to timely place issues and programs lists into its public file and to timely upload elements of the Station’s public files to the online Commission-hosted website, failed to timely file childrens’ television programming reports, and to construct at an authorized location. *Renewal Order*, 30 FCC Rcd at 12324 n.3 (citing Sections 73.3526(b), 73.3526(e)(11)(i), 73.3526(e)(11)(iii) and 73.1350(a) of the Commission’s rules, 47 C.F.R. §§ 73.3526(b), 73.3526(e)(11)(i), 73.3526(e)(11)(iii) and 73.1350(a)).

⁶ *Renewal Order*, 30 FCC Rcd at 12324 n.4 (citing 47 U.S.C. § 309(k)).

in its construction permit.⁷ The AFR caption identifies the Office of the Secretary as the addressee of the AFR, to the attention of the Chief, Video Division, Media Bureau.⁸ At the time of filing, the AFR sought review not only of renewal of the License, but also of a subsequent decision to approve an application for Commission consent to assign the Station license from Channel 61 to Cross Hill Communications, LLC (“Cross Hill”).⁹ Convergence has since withdrawn the Application for Review of the assignment decision.¹⁰

4. On April 14, 2016, Channel 61 and Cross Hill (collectively, the “Movants”) filed a Joint Motion to Dismiss (“Joint Motion”) the AFR.¹¹ With regard to the AFR of the renewal before us, the Movants assert that it is improperly addressed to the Media Bureau rather than the full Commission as required by Section 1.115(a) of the Commission’s rules, and that this request “does not lie if addressed to the Staff” and therefore should be dismissed. They also argue that the AFR must be dismissed pursuant to Section 1.115(a) because Convergence never filed any objection to the Renewal Application “and has not made (and cannot make) any showing of why it could not have participated earlier.”¹²

5. On April 25, 2016, Convergence filed the Opposition to the Joint Motion arguing that it was not aggrieved at the time of Channel 61’s filing of the Renewal Application, because Convergence “desired to preserve the License in the hope that [Convergence’s] action in state court might result in award of the License” to Convergence.¹³ Convergence goes on to claim that it now has a “direct economic interest . . . in the relief it seeks” and has been injured by the Licensee’s alleged fraud.¹⁴ It now “seeks the Commission’s findings of fraud by Channel 61, as further evidence to demonstrate to the state court the magnitude of Channel 61’s violations.”¹⁵ According to Convergence, Channel 61’s “fraudulent misrepresentations, false promises, contract interference, and wrongful termination deprived Convergence of the station that it was operating.”¹⁶

6. On May 3, 2016, the Movants filed a Reply to the Opposition, contending that because Convergence is no longer a competing licensee, it does not have standing to pursue the AFR.¹⁷ They point out that Convergence cites no authority under which pursuit of a private contractual claim is an interest that affords standing in a Commission licensing proceeding, and assert that no such authority exists. Apart from the lack of standing, the Movants also argue that any conceivable claims are late-filed because they relate exclusively to matters covered by the *Consent Decree* adopted in the *Renewal Order*, and the submission of the AFR several months after the release of the *Renewal Order* is well past the 30-day deadline for filing established by Section 1.115(d) of the Commission’s rules.¹⁸ According to the

⁷ The AFR also asserts that Channel 61 failed to broadcast for at least 13 months in violation of Section 312(g) of the Act. AFR at 2-3.

⁸ *Id.* at 1.

⁹ *Id.* at 1. The Media Bureau had approved the application for consent to assign the Station license from Channel 61 to Cross Hill in 2016. *Assignment Order*, 31 FCC Red at 1340.

¹⁰ Convergence Reply to the Joint Motion to Dismiss Application for Review (“Opposition to the Joint Motion”) at 1. Although styled as a reply to the Joint Motion, we treat this as an opposition.

¹¹ Joint Motion.

¹² AFR at 2 n.3 (citing 47 CFR § 1.115(a)).

¹³ Opposition at 2.

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Reply at 1-2.

¹⁸ *Id.* at 2 (citing 47 CFR § 1.115(d)).

Movants, Convergence's decision to change its mind about preserving the License that it hoped to be able to acquire as a result of state court proceedings does not afford standing where no standing existed before, nor does it justify late filing.¹⁹

7. On May 19, 2016, Convergence filed a "Supplemental Reply *And* Motion to Strike Defendants' Reply Re Joint Motion to Dismiss Application for Review" ("Supplemental Reply"). The Supplemental Reply reiterates Convergence's assertions, including its contentions that the *Consent Decree* did not address Channel 61's failure to construct at an authorized location and was silent without authorization for greater than 12 months.²⁰

8. On May 25, 2016, the Movants filed a letter with the Commission stating that they do not intend to respond to the Supplemental Reply, because the Commission's rules do not allow for its submission, and Convergence did not petition for leave to file such pleading.²¹ They further state that all issues in the Supplemental Reply were addressed at length in prior pleadings.

9. On May 5, 2017, the Division dismissed a petition for reconsideration filed by Convergence seeking reconsideration of the *Assignment Order* because that petition was untimely filed.²²

II. DISCUSSION

10. We dismiss the AFR because Convergence has not adequately justified its failure to participate in the underlying proceeding. Pursuant to Section 1.115(a) of the Commission's rules, a person filing an application for review "who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding."²³ Neither the AFR nor subsequent filings demonstrate why it was not possible for Convergence to participate, and therefore falls far short of meeting the latter portion of the Section 1.115(a) requirement.²⁴

11. Although Convergence attempts to explain in its Opposition why its participation in the instant proceeding was not possible,²⁵ we find the explanation unconvincing. Whether or not Convergence previously was formally "aggrieved" by the renewal request,²⁶ it nevertheless was free to participate in that proceeding through an informal objection.²⁷ Convergence acknowledges that when Channel 61's renewal application was pending it was aware of the issues it now seeks to raise in its AFR—and, in fact, raised them in the separate proceeding on the assignment request—but says it nonetheless failed to participate in the renewal proceeding because at that time it "desired to preserve the

¹⁹ *Id.* at 2 n.4.

²⁰ Supplemental Reply at 4-5.

²¹ Letter from Aaron P. Shainis, Counsel for Channel 61, and Peter Tannenwald, Counsel for Cross Hill, to Marlene H. Dortch, Secretary, FCC, File No. BRC DT-20150202 ABE (dated May 24, 2016). In support, the Movants cite Sections 1.106(f)-(h) of the Commission's rules, which govern petitions for reconsideration.

²² *Reconsideration Order*, 32 FCC Rcd 3806.

²³ 47 CFR § 1.115(a).

²⁴ Based on our conclusions here and in the remainder of this paragraph about Convergence's inadequate justification of its failure to participate previously, we need not, and do not, reach the question of whether Convergence demonstrated that it was aggrieved by the *Renewal Order* under the first prong of Section 1.115(a) except as expressly indicated below. *See infra* note 39

²⁵ Opposition at 2-3.

²⁶ *Id.*

²⁷ *See* 47 CFR § 73.3587 ("Before FCC action on any application for an instrument of authorization, any person may file informal objections to the grant.").

License,” and because, in its view, “judicial economy” would be promoted by not filing in the renewal proceeding arguments it had made in the assignment proceeding.²⁸ Convergence’s new position in its AFR regarding “preserv[ing] the License” appears to reflect a change in litigation tactics intended to influence its separate contract litigation with Channel 61.²⁹ We are not persuaded that changes over time in a party’s own subjective assessment of the best litigation strategy in a separate court case provides “good reason[s]” why it was “not possible” to participate earlier.³⁰ Further, judgments about issues such as judicial economy are appropriately made by the Commission through its procedural rules or otherwise, rather than unilaterally by private parties.³¹ We thus find that Convergence’s claims about judicial economy provide no persuasive showing of good reasons why it could not participate previously in the renewal proceeding.

12. Finally, the remaining arguments offered by Convergence about its failure to participate hinge on its misinterpretation of the *Renewal Order*. In particular, Convergence misreads the *Renewal Order* as having left open the possibility of denying the renewal application and/or making additional findings related to the renewal application.³² In fact, the *Renewal Order* is clear that it not only was addressing a Commission investigation, which it terminated with the adoption of the associated consent decree, but also was granting the license renewal consistent with section 309(k) of the Act,³³ which it did unconditionally.³⁴ Convergence nevertheless states that the *Renewal Order*’s conclusion that “[i]n the absence of new material evidence relating to this matter . . . the matters referenced above raise no substantial or material questions of fact as to whether the Licensee possesses . . . basic qualifications” permitted the Commission to consider its new allegations.³⁵ Given the unconditional nature of the renewal grant, the better interpretation of that language is that the Bureau found that there was no new material evidence relating to the renewal proceeding. In any case, at a minimum, any “new material evidence relating to this matter” would have needed to be presented to the Bureau in a petition for reconsideration within 30 days of public notice of the *Renewal Order*, rather than belatedly brought to the Commission’s attention as allegedly relevant to the renewal in an application for review of the *Renewal Order*.³⁶ Nor could this AFR be treated as a petition for reconsideration by the Bureau, among other things, because it was not filed within the statutory time period for petitions for reconsideration.³⁷ Such a

²⁸ Opposition at 2.

²⁹ See, e.g., Opposition at 7; Reply to the Opposition at 2 n.4.

³⁰ 47 CFR § 1.115(a).

³¹ See generally 47 U.S.C. § 154(j); 47 CFR § 1.1. Nor is it even clear how or why judicial economy would be served by Convergence failing to bring to the Commission’s attention in a given proceeding issues Convergence knew at the time and that it claims bears on that proceeding (among others).

³² See, e.g., Opposition at 2-3 (asserting, among other things, that the *Renewal Order* “expressly terminated *only* the investigation into Channel 61’s violations of the public file rules,” and left “a reasonable, even likely chance that additional findings to further support Petitioner’s pleadings might be published before and/or with any final order dispositive of the Renewal Application”).

³³ *Renewal Order*, 30 FCC Rcd at 12324, para. 3.

³⁴ *Id.* at 12325, para. 5.

³⁵ See, e.g., AFR at 4-5; *Renewal Order*, 30 FCC Rcd at 12324, para. 3.

³⁶ See 47 U.S.C. § 155(c) (“No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.”); 47 CFR § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”); 1.115(c) note (“Subject to the requirements of §1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.”).

³⁷ See 47 U.S.C. § 405(a) (“A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.”); 47 CFR § 1.106(f) (“The petition for

(continued....)

petition would also have been required to demonstrate why any such new evidence could not have been brought to the Commission's attention earlier.³⁸ We are not persuaded that Convergence's erroneous interpretation of the *Renewal Order* as failing to resolve the renewal excuses its failure to participate previously.³⁹

13. As a second and independent basis for dismissing the AFR, we conclude that it was not timely filed. Under the Commission's rules, an application for review must be filed within 30 days after the date on which public notice of an action is given.⁴⁰ Section 1.4(b)(2) of the Commission's rules provides that the date of public notice of a non-rulemaking document is the date of the document's release.⁴¹ Here, the release of the *Renewal Order* on November 4, 2015, established public notice as of that date, and the filing of the AFR on April 1, 2016 is, therefore, substantially late-filed.⁴² Convergence does not seek waiver of the Section 1.115(d) 30-day rule, and nothing in its filings demonstrates special circumstances to meet the high threshold to qualify for such a waiver.⁴³

14. Having dismissed the AFR on two independent grounds, the Joint Motion's request for dismissal on the basis that the AFR was improperly addressed to the Media Bureau is moot. For clarification, however, although the AFR's caption does state "Attention: Chief, Video Division, Media Bureau," it does also state "To: Office of the Secretary," and directing an application for review to the attention of a specific bureau does not, in itself, warrant dismissal. We thus do not rely on that as a basis for our dismissal here.

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reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in §1.4(b) of these rules,"); *Virgin Islands Tel. Corp. v FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993).

³⁸ 47 CFR § 1.106(b)(1).

³⁹ To the extent that Convergence believes that the subsequent *Assignment Order* – which it no longer challenges – misinterpreted or misapplied the *Renewal Order*, such concerns are beyond the scope of any request for review of the *Renewal Order* under Section 1.115 of the rules. *See, e.g.*, AFR at 2, 5-6; Opposition at 3, 6; Supplemental Reply at 9-11. In particular, Convergence has not identified why its concerns about subsequent orders such as the *Assignment Order* cause it to be aggrieved by the *Renewal Order* (rather than, at most, the *Assignment Order*). *See* 47 CFR § 1.115(a) ("Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review *of that action* by the Commission.") (emphasis added).

⁴⁰ 47 CFR § 1.115(d).

⁴¹ 47 CFR § 1.4(b)(2).

⁴² We find irrelevant Convergence's cites to apparently inconsistent statements by the Movants regarding whether they thought the AFR was timely filed, *see* Supplemental Reply at 8-9, because it ultimately is for the Commission, rather than the Movants, to authoritatively interpret and apply our rules.

⁴³ *See Centro Cultural de Mexico en el Condado de Orange*, Memorandum Opinion and Order, 31 FCC Rcd 838 (2016) (upholding the rejection of a Section 1.115(d) waiver request because "public interest alone is not sufficient to support a waiver of a filing deadline; rather the Commission '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."') (citing *Network IP v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)) (emphasis in original)).

III. ORDERING CLAUSE

15. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Sections 1.115(a), (c) and (g) of the Commission's rules, 47 CFR §§ 1.115 (a),(c),(g), the Application for Review **IS DISMISSED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary