

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

In the Matters of Application of)
)
CHANNEL 61 ASSOCIATES, LLC)
(Assignor))
) File No. BALCDT-20131115BDM
and)
) Facility ID No. 77515
CROSS HILL COMMUNICATIONS, LLC)
(Assignee)) DA 16-213
)
For Consent to Assignment of License of)
Television Station WNMN(DT), Saranac Lake, NY)

---- AND ----

CHANNEL 61 ASSOCIATES, LLC) File No. BRCDT-20150202ABE
(Applicant))
) Facility ID No. 77515
For Renewal of Broadcast License of)
Television Station WNMN(DT), Saranac Lake, NY) DA 15-1244

To: Office of the Secretary
Attention: Chief, Video Division, Media Bureau

APPLICATION FOR REVIEW

1. Convergence Entertainment and Communications, LLC, (“Petitioner”) hereby respectfully files this *Application for Review* seeking reconciliation of the statutory requirements of 47 U.S.C. § 312(g), as implemented by the Commission, and confirmed by the Court in *Eagle Broadcasting Group, Ltd. v. FCC*¹, with the recent finding(s) and order(s) of the Commission (on delegated authority – each hereafter “Staff Decision”).

2. The Staff Decision DA 15-1244 avoids issues clearly present in the evidence it reviews, but these added issues could be addressed elsewhere. However, Staff Decision

¹ *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543, 553 (D.C. Cir. 2009)

DA 16-213 reads the earlier Staff Decision for things it doesn't say, and again avoids the elephant in the room: The now admitted Statutory violations of Section 73.1350(a) of the Commission's rules, and the logical consequences apparent on even a casual review.

3. On evidence already before the Commission, and in conjunction with the Commission's official public records, applicant Channel 61 Associates, LLC (“Channel 61”) has recently admitted that it failed to broadcast any authorized signal, for a period the official records show as well over a year, with regard to its broadcast authorization identified a Facility ID No. 77515.

4. Yet the the License has not automatically been canceled nor revoked, even despite the relevant facts having been brought to the Commission's attention, and confirmed by Channel 61 in a related Consent Decree (before the Commission.)

5. Petitioner respectfully avers that if the Commission cannot differentiate the circumstances of above described Staff Decisions from the policy set forth and confirmed by the Court in *Eagle Broadcasting*, then the Commission must bring the Staff Decisions into conformance with the Commission's stated & Court approved policy. *Petitioner avers that for the Commission to do otherwise would allow arbitrary and capricious Staff Decisions to stand.*

6. On November 4, 2015, the Staff Decision identified as DA 15-1244 was released in the form of an order (“Order”) which *inter alia* adopted a consent decree (“Consent Decree”).

7. The Order found that Channel 61 had violated Section 73.1350(a) of the Commissions rules (§ 1), and in the referenced footnote (# 3), further stated that Channel 61 “failed ... to construct at an authorized site.”

8. As Channel 61's failure to ever build per the Construction Permit is now a fact confirmed by the Commission, the logical consequences of that fact are now relevant for consideration, which the Staff Decisions failed to do.

9. As Channel 61 had failed to build per the authorization specified in its construction permit (“Construction Permit”), the Construction Permit should have expired on October 4, 2007, (just two days after the false Application to Cover was filed, under deadline pressure, on October 2, 2007.)

10. The Application to Cover was materially misrepresentative because Channel 61 had never broadcast a signal per the authorization of its Construction Permit. As a logical consequence of this defect, the certifications in the Application to Cover: by the engineer certifying compliance, and the Channel 61 member certifying and submitting the Application to Cover, were also false.

11. The Application to Cover remained pending for nearly two and a half years, during which time, Channel 61 was to be performing program tests, and otherwise be on the air in a full broadcast fashion.

12. However, as Channel 61 never built the facilities specified in its Construction Permit, it was in fact silent for at least the first thirteen months of its program test period. (All the way up until the December 2009 STA for emergency broadcasting from an alternate site. *See* FCC File No. BSTA - 20081218ADN)

13. Therefore, even overlooking Channel 61's failure to accurately file its Application to Cover, as Channel 61 failed to build per its Construction Permit, it failed to make any broadcasts that might be considered authorized until December 2009.

14. In *Eagle Broadcasting*, on page 3 it states:

Pointing to § 301 of the [Communications] Act, the Commission noted that the Act clearly prohibits any person from transmitting broadcast signals except with a license granted by the Commission. The FCC therefore held that Eagle's unauthorized broadcasts ... were insufficient to avoid the strictures of § 312(g). *See Eagle Broadcasting Group, Ltd.*, 23 F.C.C.R. 588 (2008)

15. *Eagle Broadcasting* goes on to state (page 10):

Unlicensed radio transmissions are not recognized under the [Communications] Act. And nothing in § 312 says otherwise. It is therefore an understatement to say that it strains credulity to suggest that the reference to “broadcast signals” in § 312(g) includes *unauthorized* and *unlicensed* transmissions.

...

Under the statute, unauthorized and unlicensed transmissions are no better than silence.

16. Per the above, Petitioner avers that Channel 61's present avoidance of the consequences of § 312 (g), *if let to stand will become* “an agency's unexplained departure from precedent [which] must be overturned as arbitrary and capricious.” *See Comcast Corp.*, 526 F.3d at 769.

17. The Staff Decisions have failed to take notice of the significance of the facts they affirm. The message being sent is for a broadcaster to plead guilty to a lesser violation, and with a Consent Decree, there is a path to avoid much more serious mandatory statutory consequences – but whatever you do, don't admit to actually being off the air for over a year.

18. Therefore Petitioner respectfully requests that the Commission take notice of the facts already before it, and distinguish the circumstances of Channel 61 and its license, *or* make the necessary adjustments to its Staff Decision's to bring them in line with the Commission's stated policy.

19. The Order in paragraph 3 states “In the absence of new material evidence...”. Petitioner avers that its *Petition to Deny*, and *Reply to Joint Opposition to Petition to Deny*, in the above captioned application for consent to assignment, present new evidence of which the Order did not take notice.

20. Additionally, Petitioner avers that in DA 16-213 the Staff Decision (which in part dismisses, and in part denies the *Petition to Deny*), it has been held to a burden of proof not appropriate to this stage of the proceeding, and in response, in a *Petition for Reconsideration* to be filed contemporaneous with this *Application for Review*, Petitioner introduces new evidence to

meet that unduly imposed burden of proof. Petitioner avers that this would also be new evidence relevant to the Order's third paragraph, as quoted above.

21. Additional new evidence can be found in the *Affidavit of Erl Svendsen* and *Affidavit of Greg Best*, both of which are attached to the *Reply to Joint Opposition to Petition to Deny*, filed by Petitioner in the above captioned application for consent to assignment; and hereby incorporate herein by reference. These affidavits cast great doubt that Channel 61 ever broadcast on any continuous basis from anywhere at the overall (multi) tower site managed by Mr. Svendsen. *See especially paragraphs 23 – 25 of the Svendsen Affidavit, wherein he states that there was no power usage attributable to Channel 61. No power consumption means no broadcast what so ever – authorized or unauthorized.*

22. Petitioner also notes that in paragraph 11 of the Consent Decree, the Commission agrees to not take certain actions on its own motion. Petitioner respectfully requests and so moves the Commission to undertake each of those actions for which it has so agreed to not undertake *on its own initiative*.

23. Petitioner also notes that in its paragraph 11, the Consent Decree states that the Bureau agrees to terminate the Investigation, with the “Investigation” defined in the Consent Decree's definition section as Channel 61's compliance with the Public File Rules.

24. Petitioner avers that per the above, no investigation was terminated with regard to unauthorized operations, and/or character issues that might be indicated by such unauthorized operations, and the material misrepresentations, and/or failures to disclose such in Channel 61's official dealings with the Commission.

25. Petitioner avers that the Order and Consent Decree can stand as they are – as long as they are not held to say things which they clearly don't.

26. Clearly the two Staff Decisions are related: a) they cite & reference each other, b) they have overlapping issues, c) they have overlapping parties, and d) they make determinations on overlapping evidence.

27. Therefore, as DA 16-213 cites the Consent Decree for allegedly terminating the Character Issue investigation, *and* in its paragraph 16, when the Consent Decree says that it “shall not be used as evidence or precedent in any other ... proceeding, except in an action related to this Consent Decree.”, the Commission's staff has clearly indicated that the two Staff Decisions are related enough that they can cite each other for “evidence or precedent”.

28. Given the above, Petitioner avers that there is no reason to modify the Order and/or the Consent Decree, but instead, the Staff Decision DA 16-213 should be amended to take notice of the admitted unauthorized operations by Channel 61, and the logical consequence that their broadcast authorization was silent for over a year, per *American Eagle*, and that therefore the Commission is compelled to follow its stated and Court approved policy, and per Section 312(a) of the Commission' rules, revoke the Channel 61 license (and therefore also deny final grant of consent for assignment, per the above captioned application for consent of assignment.)

I, Jeffrey Loper as Managing Member of Petitioner, verify under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

**CONVERGENCE ENTERTAINMENT AND
COMMUNICATIONS, LLC**

3212 Masters Drive
Clearwater, Florida 33761
(727) 365-5853

By: /s/ Jeffrey Loper _____
Jeffrey Loper
Managing Member

April 1, 2016

CERTIFICATE OF SERVICE

I, Jeffrey Loper, Managing Member of Convergence Entertainment and Communications, LLC, do hereby certify that a copy of the foregoing “Reply to Joint Opposition to Petition to Deny” was mailed by First Class U.S. Mail, this 1st day of April, 2016, to the following:

Aaron Shainis
Shainis & Peltzman, Chartered
1850 M Street, N.W., Suite 240
Washington, DC 20036
(Counsel for Channel 61 Associates, LLC)

Peter Tannenwald
Fletcher Heald & Hildreth, P.L.C.
1300 N. 17th Street, 11th Floor
Arlington, VA 22209-3801
(Counsel for Cross Hill Communications, LLC)

/s/ Jeffrey Loper _____
Jeffrey Loper