

## CALIFORNIA LICENSE RENEWAL AND LICENSEE CERTIFICATIONS

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With 2011 coming to a close, it's interesting and significant to realize that the radio renewal cycle, marking the dates by which radio licensees must file their FCC renewal applications, will be about 20 percent done. Next June will start the television renewal cycle, and each will move across the country and back over a period of 3 years, with the Delaware and Pennsylvania bringing in the final renewal filing dates of April 2014 for radio and 2015 for TV.

California's renewal application filing date for radio is August 1, 2013 and 2014 for TV. With an eight year renewal term, this will be the first renewal application for many, and even if they've been through it before, many others may have not yet focused on some of the new renewal form certifications. One that has received a lot of attention is a requirement to certify that the station has not accepted any "no urban dictate" advertising. Another certification that has received less notoriety, yet warrants some attention to bring it into the consciousness of licensees, particularly in an age when multiple local station ownership and operation have become not only the norm, but by some reckoning, a necessity, deals with stations that have gone off-the-air.

With multiple stations to manage to profitability in market clusters, some have reached the point of diminishing returns where, even though taken off the air for one or another reason, it is no longer critical to return it to the air as quickly as possible. In other situations, because FM has become dominant and some Class C AMs may have limited reach and power that no longer covers all the critical population areas with a daytime signal, a station may have been allowed to stay dark for extended periods. In either situation, the licensee may not be counting down the days of darkness toward a crucial deadline.

Section III, Item 5 of the renewal form requires the licensee to certify that the station was not silent for any consecutive 12-month period during the preceding license term. If an applicant cannot make this certification, its license renewal application will be dismissed and the Commission's database will be amended to reflect the expiration of the station's license.

Congress added section 312(g) to the Communications Act to prevent warehousing of station licenses and broadcasting spectrum. It provides that if a broadcast station fails to transmit broadcast signals consecutively for 12 months, the station license expires by law, without any further action by the FCC. Some broadcasters who have exceeded the 12-month dark period and have yet to be notified by the FCC may not even realize that they have no license to renew.

This will happen to any station that has remained dark for a consecutive 12-month period even if it properly notified the FCC when it went dark and even if it obtained FCC permission through a Special Temporary Authorization to remain off the air for an extended period. In fact, under the statute as first enacted, the FCC did not even have discretion to waive the cancellation for good cause in extraordinary circumstances.

The automatic license cancellation provision of section 312(g) proved to be so draconian, that in 2004 Congress amended it to provide the Commission with discretion to extend or reinstate such a license where appropriate "to promote equity and fairness." However, it was given scant

guidance on what would “promote equity and fairness.” And history has proven it reticent to extend this standard to any but the most extreme of circumstances.

The FCC’s attitude can be seen in a 2008 case involving Family Life Ministries. The licensee discovered that a translator “utterly failed” to provide its intended coverage and canceled its “prohibitively expensive” tower lease. A year passed while attempting to identify a new transmitter location. The licensee argued that under 312(g), as amended, the Commission had discretion to reinstate licenses “to promote equity and fairness.” Yet, the staff rejected Family Life’s argument, finding that there was no “persuasive evidence ... that the Station's silence was due to circumstances beyond its control,” but rather that “the Station was taken off the air due to Family Life's desire to meet its goals for the station in a more economical manner.” The Commission distinguished these circumstances from those encountered by WVIS(FM) in Puerto Rico, where a hurricane was considered an act of God and not within a licensee's control. On the other hand, choosing an unsuitable and/or uneconomic site initially, and then failing timely to find a replacement site, were considered to be the licensee’s own acts, well within its control.

The Family Life case also points out that that the 12-month limit applies not only to full-power stations, but equally to translators and boosters. When met with construction challenges, a licensee may overlook the 12-month timing since primary attention may remain focused on the primary station.

Moreover, frantically putting the station on the air at variance from the station construction permit or license, and without FCC authority to toll the 12 month time limit will not save the license at the last minute. The Commission has rejected this tactic in several cases.

The licensee must also certify in Item 6 of the renewal form that that the station is currently on the air broadcasting programming intended to be received by the public. The Commission will not renew a station license when it is not currently broadcasting.

As discussed in the Family Life case, to meet the equity and fairness requirement, the Commission requires a licensee to meet the tolling requirements where resumption of broadcast operations is prevented “. . . due to an act of God, defined in terms of natural disasters (e.g., floods, tornados, hurricanes, or earthquakes).” So, while we may have some examples, what does the law define as an act of God?

Many courts look to the 1922 New York case *Woodruff v Oleite Corporation* for the definition of an “act of God.” In that case, the court said it is “[S]omething which operates without any aid or interference of man,” without human aid, interference, or an act of human negligence.

An act of God has been similiarly defined by other authorities. *Black’s Law Dictionary* calls it “An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.” In the US Code, it has been defined as “all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight.” 42 USCA § 9601(1).

So, where licensed facilities were located within the path of hurricanes that destroyed the station's tower, and while rebuilding the tower, the station's facilities sustained further substantial

damage from additional hurricanes, taking the station off the air, the station qualified for relief from the 12-month death sentence and under the discretion afforded by Section 312(g), as revised, and its previously forfeited station license was reinstated.

But such situations are relatively rare and the vast majority of authorizations that have been silent for more than a year are permanently terminated.