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Nine Years Of Sporadic, Unauthorized Operation Draw Short-Term Renewal

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Recently the Commission bared its regulatory fangs at a hapless licensee who, for the better part of a decade, had had trouble keeping (a) its station on the air and (b) the FCC notified of what was going on with its station. After nearly a decade of seemingly near-total disregard for the FCC, the licensee finally suffered the wrath of the regulator: it got a short-term renewal and an \$18,000 fine – but (and it’s a big “but”), unlike a couple of other recent cases, the Commission did *not* take the station’s license away.

The station in question is in American Samoa. It went off the air on May 4, 1999. Section 312(g) of the Communications Act provides that, when a station fails to operate for 12 consecutive months, its license is generally deemed to have automatically expired. With that 12-month clock counting down, in March, 2000 – ten months after the station went silent – the station was bought by South Seas Broadcasting (SSB).

SSB advised the Commission that it had returned the station to operation on April 27, 2000, just in the nick of time, but it did so only with unauthorized facilities (the 2000 Temporary Facilities) inconsistent with those specified in its license – and it hadn’t bothered to ask the FCC for permission to use the 2000 Temporary Facilities even temporarily. And it then operated only for 3 days until April 30, 2000, before it went silent again.

On May 1, 2000, SSB supposedly filed a request for special temporary authority (STA) to operate with temporary facilities. The FCC claims to have no record of receiving that filing, which probably explains why the Commission never acted on it. (SSB was able to produce a copy of such a request stamped “received” by the Commission on May 22, 2000 – it’s not clear why it might have taken so long for a May 1 letter to reach the Commission, but we are talking American Samoa, after all, which is about as far away from the FCC as you can get.) Despite that mere niggle, SSB says it cranked the station back up in late June, 2000, apparently with the still unauthorized 2000 Temporary Facilities.

So SSB's story is that the station was on the air from June, 2000, until December, 2003. But an American Samoa listener complained to the FCC in September, 2003, that the station hadn't been on the air since 1999. The Commission sent an inquiry to SSB asking what was up. Having received no response within the allotted time, the Commission sent a follow-up inquiry on February 25. In early March, 2004, SSB finally responded, advising the Commission that the station had been off the air from May, 1999, to April 27, 2000. SSB also said in that March, 2004, response that the station had also gone off the air in late December, 2003, because of a lightning strike, and then a cyclone had blown through in January, 2004, destroying the 2000 Temporary Facilities. So the station had been off the air from December, 2003, into March, 2004. In mid-March, 2004, the station cranked up again, this time with yet another set of previously-authorized facilities (the 2004 Temporary Facilities). According to SSB, a couple of days after commencing operation with those facilities SSB got around to requesting an STA to cover them – but again, the FCC has no record of that supposed request, so it never happened to get granted.

Five months later the station was off the air again. SSB claims that it notified the Commission of this turn of events by letter dated August 25, 2004, but again the FCC says it has no record of such a letter. In November, 2004, SSB asked for an STA to operate with the 2004 Temporary Facilities. In response, the Commission's staff sent SSB a further inquiry about (a) the station's operational status prior to May, 2000, and (b) a July, 2000, STA request which SSB claimed to have filed but of which the FCC was apparently unaware. Importantly, this inquiry, dated November 30, 2004, gave SSB 30 days in which to respond. Failure to do so would result in cancellation of the station's license.

SSB failed to respond within the 30-day period and, on January 26, the Commission sent it a letter canceling the license. But two days later – on January 28 – SSB filed a letter, dated January 18, 2005, responding to the November inquiry. SSB's basic position was that it had been forced to operate with emergency facilities in 2000 and that, when the 2000 Temporary Facilities were destroyed, it encountered considerable difficulty in obtaining an alternate permanent site, thus necessitating the 2004 Temporary Facilities.

So what we have is a station which, when it operated at all, does not appear to have operated with any authorized facilities for years. It does not appear to have notified the FCC of its off-air status, as required, nor does it appear to have properly requested permission to operate with previously unauthorized facilities. In similar circumstances, the FCC has held that Section 312(g) mandates loss of the license.

Here, though, the Commission reinstated the license, whacked SSB for an \$18,000 fine, and renewed the license, albeit for a less-than-full term. The renewal alone was a surprise, since the station is *still* not operating with licensed facilities, and the Commission routinely declines to renew licenses under those circumstances.

What about the 12-month off-air question? According to the Commission, it could not conclude that the station was off the air for any 12 consecutive month period, even though it seems that most of the time the station supposedly operated between 2000-2003, it did so with unauthorized facilities – and the Commission’s historical position has been that such unauthorized operation does *not* permit a licensee to get around the strictures of Section 312(g).

We won’t second-guess the FCC staff. But for sure, we should all hope that the Commission is prepared to be as lenient with the rest of us as it was with SSB – and we might also question why the Commission chose to apply this seemingly benevolent policy in this case but chose not to do so in a couple of other recent, similar cases. The folks who didn’t get the same kind of break may legitimately believe that the FCC staff’s actions are inexplicably arbitrary and capricious.