

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the matter of

County of San Bernardino, Area 40	)	K34QW-D, Daggett, California
	)	Facility ID 11537
	)	
County of San Bernardino, Area 70	)	K25GK-D, Joshua Tree, CA
	)	Facility ID 43812
	)	
County of San Bernardino, Area 70 TV2	)	K21GI-D, Morongo Valley, CA
	)	Facility ID 11539

To: The Commission:

APPLICATION FOR REVIEW

\* \* \*

Michael Couzens,  
*Attorney for Department of Special Districts,  
County of San Bernardino, California*

Michael Couzens Law Office  
Box 3642  
Oakland, CA 94609

Tel. (510) 658-7654  
[cuzi@well.com](mailto:cuzi@well.com)

December 6, 2021.

## **TABLE OF CONTENTS**

**1. IN MAKING A PROMPT AND COMPLETE TRANSITION TO DIGITAL TV, SAN BERNARDINO COUNTY WAS ACTING DILIGENTLY TO FURTHER THE COMMISSION'S OWN STATED GOALS. (CFR Sec. 115(b)(2)(iv)), p. 2.**

**2. CONTRARY TO THE LETTER, THE 2015 TERMINATION OF ANALOG FACILITIES WAS NOT A "BUSINESS DECISION." (CFR 47 Sec. 115(b)(2)(iv)) p. 4.**

**3. STAFF LACKED DELEGATED AUTHORITY TO ENFORCE SECTION 312(G) BECAUSE CORRECT IMPLEMENTING RULES NEVER WERE LAWFULLY ENACTED. THE QUESTION OF APPLICABLE LAW HAD NOT BEEN RESOLVED, CFR Sec. 115(b)(2)(ii), p. 6.**

**4. A FURTHER REASON THAT STAFF SHOULD HAVE REFERRED THIS MATTER TO THE FULL COMMISSION IS BECAUSE THE CASE PRESENTS NOVEL FACTS AND CIRCUMSTANCES. 47 CFR Sec. 1.115(b)(2)(ii), p. 8.**

**5. REMEDIES ARE AVAILABLE, LESS DRASTIC THAN THE OUTRIGHT TERMINATION OF BROADCAST SERVICE, AND THESE SHOULD BE GIVEN CONSIDERATION, CFR Sec. 1.115(b)(4), p. 9.**

**CONSENT DECREE, p. 9.**

**NEW FILING WINDOW, p. 11.**

**6. CONCLUSION, p. 14.**

**Attachment A.** San Bernardino County, Response to Notification

**Attachment B.** Supplemental Response to Notification

**Attachment C.** Staff Letter on Delegated Authority, November 4, 2021.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the matter of

County of San Bernardino, Area 40	)	K34QW-D, Daggett, California
	)	Facility ID 11537
	)	
County of San Bernardino, Area 70	)	K25GK-D, Joshua Tree, CA
	)	Facility ID 43812
	)	
County of San Bernardino, Area 70 TV2	)	K21GI-D, Morongo Valley, CA
	)	Facility ID 11539

To: The Commission:

APPLICATION FOR REVIEW

Department of Special Districts of San Bernardino County, California (“SBC” or “the County”), by its attorney, here seeks review of an action on delegated authority by the Chief of the Video Division, Media Bureau, dated November 4, 2021 (Attachment C hereto, “Letter”). This application is submitted pursuant to Section 1.115 of the Commission's Rules and Regulations.

The Letter, upon three days' notice, canceled the authorizations and deleted the call signs of the three SBC TV Translator facilities listed in the caption that, pursuant to construction permit, had been constructed and license applied for, and were being regularly operated from day to day, bringing valuable TV services to three isolated rural communities in the Mojave Desert.

This action involves questions of law and policy which have not been previously

resolved by the Commission, 47 CFR Sec. 1.115(2)(iii) of the Rules. There is no precedent for an action, terminating live and ongoing broadcast services without recourse, when they had been constructed by an instrumentality of State government, with taxpayer funds, under the terms permitted by their issued construction permits.

The action purports to be an implementation of Section 312(g) of the Communications Act, 47 U.S.C. Sec. 312(g), which imposes a license expiration on a broadcast facility when it has not operated for twelve consecutive months. The Letter fails adequately to address and to apply the waiver provisions of Section 312(g) itself. In this way it does not align with precedent and should be overturned or revised, 47 CFR Section 1.115(2)(iii). Even if the Letter's conclusions are upheld, the action should be vacated, and less onerous and less punitive remedies adopted, 47 CFR Sec. 1115(b)(4).

**1. IN MAKING A PROMPT AND COMPLETE TRANSITION TO DIGITAL TV, SAN BERNARDINO COUNTY WAS ACTING DILIGENTLY TO FURTHER THE COMMISSION'S OWN STATED GOALS. (CFR Sec. 115(b)(2)(iv))**

The County terminated all analog broadcast TV services by September, 2013. This fact is not in dispute. The letter makes the erroneous finding throughout that this action was contrary to law, policy and the public interest. In fact the action furthered the Government interest in a prompt transition to Digital TV, and should not be punished in any way, CFR Sec. 115(b)(2)(4).

Since the 1970's the County has provided over-the-air television broadcast services, supported by tax revenue, to isolated rural communities by use of TV

translators located principally at four County-owned towers. Currently each cluster uses three licensed stations to multiplex and rebroadcast a total of twelve channels of full service TV or other service.

The digital transition for these facilities was shaped by two published deadlines. Congress created a reimbursement program for expenses in converting from analog to digital. To be eligible the operator needed to construct and license its station prior to the final grant application deadline of July 2, 2012. The other impinging deadline was the announcement by the FCC that all analog stations would be terminated and their license forfeited on September 1, 2015.

By the NTIA deadline, the County had constructed and sought funds for a total of three stations at each of its four main locations, with two more for a small shadowed community at Newberry Springs. It made a series of announcements on June 18, 2012, that, beginning on July 1, 2012, a first DTV channel would be on the air. Analog channels would remain available, “but only for a limited time and not past the FCC low power analog systems conversion deadline of September 15 [sic.], 2015.” *News*, Attachment A. Fourteen months later, on August 22, 2013, the County issued a new series of News Releases, Attachment A, stating that all of its analog services would cease and that analog licenses would be returned to the FCC by “on or about September 16, 2013.” As stated in the News Release:

For over a year now the District has duplicated broadcast of both analog and digital TV channels in an effort to accommodate the viewership. At the end of

September the District will relinquish its Federal Communications Commission (FCC) analog broadcast licenses in favor of providing only digital broadcasts as mandated by the FCC.

As the News Releases makes clear, County officials were acting in furtherance of an FCC-mandated termination of all analog facilities and that they were taking this action well ahead of the final hard deadline of September 15 (actually, September 1), 2015.<sup>1</sup>

The County's goal was to add a fourth DTV channel at each location. To that end it applied for Digital TV construction permits for the facilities identified in the caption. In each instance, the underlying analog transmission ended, in the good faith belief that the digital construction permit superseded it and that, regardless, the analog service would terminate on September 1, 2015.<sup>2</sup>

## **2. CONTRARY TO THE LETTER, THE 2015 TERMINATION OF ANALOG FACILITIES WAS NOT A “BUSINESS DECISION.” (CFR 47 Sec. 115(b)(2)(iv)).**

The Letter dismisses the County's explanation for its cessation of analog TV as merely a business decision. This was an erroneous finding, 47 CFR Sec. 115(b)(2)(iv) that was based on the misapplication of precedent, 47 CFR Sec. 115(b)(2)(iii).

It goes without saying that the Department of Special Districts, San Bernardino County, is not a “business.” It is an instrumentality of State government, created under state law to collect taxes and to perform certain enumerated services, including the creation and improvement of TV translator facilities.<sup>3</sup>

---

<sup>1</sup> On August 15, 2014, DSD submitted a list of sixteen other analog licenses for cancellation.

<sup>2</sup> The Commission in effect repealed that analog sunset deadline when it formally proposed to do so in a Notice of Proposed Rule Making in the digital LPTV proceeding, FCC 14-151 released on October 10, 2014.

<sup>3</sup> “Within its boundaries, a district may do any of the following: . . . (v) Acquire, construct, improve, maintain and operate television translator facilities.” California Government Code, Section 61100(v).

Facing a deadline as it then was, of September 1, 2015, for the complete phase-out of analog TV facilities, the County moved aggressively to construct new DTV facilities and to inform the public that the change to Digital TV was coming. CSB stated in its case presented here, Attachment A, and the Letter acknowledges its view that “continuation of the unwanted analog would have disrupted the transition, given mixed messages and confused the public. Continuance of the unwanted analog would have delayed, not facilitate service to the public.” It was indeed less than generous for the Letter to denigrate these goals – in direct support and furtherance of a key initiative of the Federal Government — as a mere business decision.

In light of this, the cases cited by the Letter to allege a “business judgment” are inapplicable here. *Zacarias Serrato*, Letter Order, 20 FCC Rcd 17232 (MB, 2005) involved a station that was taken off the air because it caused destructive interference. Thereafter, the licensee declined to enter into a new lease, and for three years refused to look for an alternate site “because of the cost of the land.” In *Kingdom of God, Inc.*, Letter Order, 29 FCC Rcd 11589 (MB 2014) a Class A TV station had been off the air for 96 months and on for less than three months, over a nine-year period. While the licensee was purporting to search for a replacement to its tower that was disassembled, a letter in the record indicated it had access to a tower for approximately the last five years. Thus it was held that the extended silences “are a direct result of [Licensee's] own business decisions. . . .” *Id.* At 11591.

**3. STAFF LACKED DELEGATED AUTHORITY TO ENFORCE SECTION 312(G) BECAUSE CORRECT IMPLEMENTING RULES NEVER WERE LAWFULLY ENACTED. THE QUESTION OF APPLICABLE LAW HAD NOT BEEN RESOLVED, CFR Sec. 115(b)(2)(ii).**

Section 312(g) was added to the organic communications statute by the Telecommunications Act of 1996, PL 104-104, Sec. 403(l), 110 Stat. 132, Sec. 403(l) (February 8, 1996). It provided:

*If a broadcast station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary. . . .*

In 2004 the section was modified by language in the massive budget reconciliation of that year, to introduce discretion by the FCC to waive or reverse any implementation of the policy, Pub. L. 108-447, div. J, Title IX [title II, §213(3)], 118 Stat. 3431 (December 8, 2004):

*except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.*

The original 1996 section gave birth to an implementing rule that same year, 47 CFR Section 73.140(c), 61 FR 28767, June 6, 1996.

*(c) The license of any broadcasting station that fails to transmit broadcast signals for any consecutive 12-month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.*



However, in light of the 2004 Statutory revision, nothing was done at the Commission to modify this rule and there it stands unmodified, for 17 years and as recently as September 1, 2021.<sup>4</sup> The Commission probably should have and still could conduct formal notice-and-comment rule making proceedings to ascertain precisely what was meant by Congress in its 2004 modifications to Sec. 312(g). A record could have been developed, and rational standards adopted to implement each phrase in the statute. In the process the Commission might have explored the degree to which Congress actually intended to mitigate the effects of the categorical statute.

The Commission did no such thing. Staff acting on delegated authority were left to guess whether they should follow the revised Statute, or follow the unrevised and stricter Commission rule. What appears to have happened in adjudications is a combination of both, recognizing the liberalizing amendment of 2004 but giving it the most crabbed, ungenerous and strict application in line with the pitiless unchanged 1996 Commission rules.

---

<sup>4</sup>A cognate section of the rules is cited as authority in the letter, CFR Section 74.15(f). It states:

(f) The license of an FM translator or FM broadcast booster, TV translator or TV broadcast booster, or low power TV station will expire as a matter of law upon failure to transmit broadcast signals for any consecutive 12-month period notwithstanding any provision, term, or condition of the license to the contrary. Further, if the license of any AM, FM, or TV broadcasting station licensed under part 73 of this chapter expires for failure to transmit signals for any consecutive 12-month period, the licensee's authorizations under part 74, subparts D, E, F, and H in connection with the operation of that AM, FM, or TV broadcasting station will also expire notwithstanding any provision, term, or condition to the contrary.

Again, as of September 1, 2021, this rule has never been modified to conform with the Statute, and thus is incomplete.

The delegations of authority to the Media Bureau do not include the authority to make up rules of decision in uncharted territory such as this. See: 47 CFR Section 0.283 of the Rules:

provided that the following matters shall be referred to the Commission en banc for disposition: . . . (c) Matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.

There have been no rules, and there are no precedents and no guidelines, to instruct the staff on how to Apply Sec. 312(g) of the Act [2004], in conjunction with the unmodified Commission rule [1996]. Decisions purportedly made by staff in this area lack the force of precedent, and the staff decision here and all such decisions should be vacated.

Contrary to the Letter, the decision of the full Commission in *A-O Broadcasting*, 23 FCC Rcd 603 (2008), is not dispositive of this matter. The facts in that case preceded the statutory amendment, and so the guidelines stated there cannot stand as more than *dicta*. In that case the Commission provides guidance to delegated authority which is no guidance at all (para. 26):

The Commission and its staff will determine on a case-by-case basis whether any purported equities associated with individual circumstances warrant reinstatement of a license forfeited pursuant to Section 312(g).

To say the least, this is a question of law or policy which has not been previously resolved by the Commission (47 CFR Sec. 1.115(b)(2)(ii)).

**4. A FURTHER REASON THAT STAFF SHOULD HAVE REFERRED THIS MATTER TO THE COMMISSION IS BECAUSE THE CASE PRESENTS NOVEL FACTS AND CIRCUMSTANCES, 47 CFR Sec. 1.115(b)(2)(ii).**

The discretionary language of Section 312(g) recognizes situations were “the applicable law changes.” Such is the case here. The discontinuation of analog service arose with a licensee trying in good faith to move its facilities into the digital TV age and to phase out analog signals. In CSB's case, the grant and uninterrupted continuance of digital Construction Permits for several years strongly implied, and gave basis for the good faith belief that the authority granted by the Commission to implement DTV service remained valid at all times, notwithstanding the discontinuance of analog transmissions.<sup>5</sup> This continued to be the case for the seven years until the facilities were constructed and licenses applied for, so the duration of the “violation” can be excused or the effectively mitigated, irrespective of the duration.

The Commission could have stated an intention to revoke all pending construction permits not supported by the continued “unitary” operation of analog facilities, but it made no such announcements and took no such action. The licensees themselves were expected to rely on a complete understanding of all the fine print in the digital TV transition and TV channel re-packing. This was not a reasonable approach.

The factual situation here also is distinct because it involves the termination of facilities funded and operated by local government. The comity and consideration that

---

<sup>5</sup> The Letter actually buttresses this view, with references in fn. 9 to the special efforts the Commission was extending during the broadcast transition, to assure that stations attempting to comply did not find themselves technically in Sec. 312(g) violation.

should be accorded to official acts throughout our Federal system should have been factored into the consideration of requested relief, but was not.

**5. REMEDIES ARE AVAILABLE, LESS DRASTIC THAN THE OUTRIGHT TERMINATION OF BROADCAST SERVICE, AND THESE SHOULD BE GIVEN CONSIDERATION, CFR Sec. 1.115(b)(4).**

Even assuming that the County was mistaken in the belief that a digital construction permit superseded the obsolete analog license, allowing it to discontinue analog transmissions, the drastic remedy selected here – the extinguishment of needed TV broadcast service in an underserved rural area – remains problematic. It is not a “punishment” for the supposedly errant County officials, but falls most heavily on the residents of isolated and needy rural areas. There must be a better solution, and there is.

**CONSENT DECREE**

In a recent case, the Media Bureau waived the effect of Section 312(g) where the submission of timely STA request was prevented by a general shut-down of Commission operations, due to a lapse of government funding, *Universal Broadcasting of New York, Inc.*, 34 FCC Rcd 10219 (MB, 2019). At that time, the licensee was trying to meet the 312(g) anniversary cutoff by use of a so-called “emergency” antenna with parameters not consistent with the authorization. As noted in the decision, the Commission has specifically rejected this type of attempt to circumvent Section 312(g). Nevertheless, in all the circumstances, the Commission chose to allow the licensee to

resume broadcasting (and to sell the facility), under a consent decree, with the payment of a fine and the promise of certain compliance oversight and control.

Nothing in our case has the severity of the deliberate misdirection play of the licensee in *Universal, Id.*, seeking to avoid the statute with non-conforming facilities. The case before us here, if anything, is a stronger one, warranting a Consent Decree solution. The licensee in *Universal* was trying to revive the facility so that it could quickly be sold. The County of San Bernardino has these facilities in place and wants permission to resume service immediately. The stations were able to operate successfully with no suggestion of objectionable interference, and the public interest in having them resume is clear.<sup>6</sup>

#### **NEW FILING WINDOW.**

Low Power Television and TV Translators are subject to an indefinite freeze on applications for new and major change facilities. The last general filing window, excepting from the freeze, was in the Winter of 2002. A limited filing window was made available for Digital TV companion channels during the Fourth Quarter of 2006<sup>7</sup>. In the intervening years, the TV news, information and entertainment program services available to a typical TV household throughout the United States have grown, via cable, satellite, and Internet Protocol streaming, from perhaps 35 channels to become a smorgasbord of hundreds of services. In isolated rural areas, in no service more than TV

---

<sup>6</sup> A lengthy appellate process, even if successful, would not achieve this result for an extended period of time.

<sup>7</sup> *Translator Digital Filing Window for Auction No. 85*, Public Notice, DA 06-874, rel. April 20, 2006.

broadcasting has a digital divide become more apparent, compared with the rest of the country. Services such as the TV translators provided by the County remain a vital

lifeline for some of these isolated communities. Given the freeze on applications, there had been no opportunity in many years to expand such service to the public<sup>8</sup>

Were a filing widow to be announced, whether generally, or limited in some manner to rural communities, the County would quickly apply for authorizations on each of the three channels where service was suspended, and where equipment from the completed construction remains readily available. In any case where an application emerged as clean and uncontested, the County would be able immediately to apply for Special Temporary Authorization consistent with the parameters of each construction permit application. Possibly this would be the fastest way to assure that these services, which never should have been terminated, can resume.

In some ways we have come full circle from the day, in 1956, when C.J. Community Services, a volunteer organization in Bridgeport, Washington, constructed a TV booster on Dyer Mountain, 1400 feet above town, and used it to obtain two TV signals from Spokane, some 110 miles away. The booster did not cause interference, and the stations being rebroadcast, NBC and ABC stations, had no objection to it. After

---

<sup>8</sup> The Letter advances a bizarre claim at p. 9 that "the Stations at issue are not the only source of entertainment, news, and emergency information to those within San Bernardino County. CSB holds licenses for nine other TV translator stations from which it can continue to provide programming to its viewers," noting in fn 53 the three other stations at each of the transmitter sites with which we are concerned here. Surely it is not the Commission's view that three stations multiplexing twelve channels of television are plenty enough service for a community, so that the desire for more channels lacks public interest value.

a field investigation, the Commission ordered the booster operator to cease and desist from operating a television broadcast station, in violation of Section 312(c) of the Communications Act.

On appeal, the Commission informed the D.C. Circuit that it considered itself to have no discretion but to issue the order. The Court disagreed, *C.J. Community Services, Inc v. FCC*, 246 F. 2d 660 (Ct. App. DC, 1957). The court acknowledging that the station operated in derogation of the Commission's need to assert maintenance and control over channels of radio. But the court held that the Commission had a range of less drastic options, and notably that it could “well get on with the rule-making proceedings” looking into the feasibility of boosters. The court also noted that Congress, in conferring cease and desist authority, also gave the Commission a range of options, including non-exercise:

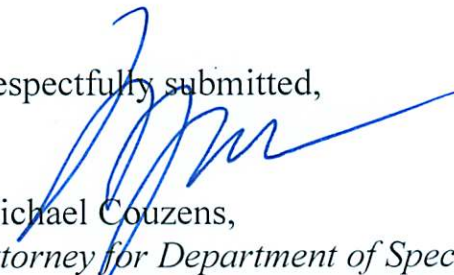
As we remand the case, we observe that the Commission itself may conclude that it is manifestly inequitable that the appellant be subject to a cease and desist order when the Commission has failed to provide an administrative mechanism through which a license may be procured. [*Id.* At 664]

The Court even suggested that the appellant might be issued an STA during rule making, if an appropriate proceeding got underway. The lesson for today is that discretion is best aligned with efforts to support the larger and more effective use of radio in the public interest. Otherwise, it becomes a purely punitive exercise of jurisdiction, entirely detached from the goals set forth by Congress and the Communications Act.

## 6. CONCLUSION

For the reasons stated, the Commission should vacate the order on delegated authority that terminated service by these three stations. In its place the Commission has discretion to apply a range of appropriate remedies – singly or together – including no action, a consent decree, STA, forfeiture, or best of all, a new filing window enabling San Bernardino County and all interested parties to expand TV broadcast service to underserved communities in Rural America.

Respectfully submitted,

  
Michael Couzens,  
*Attorney for Department of Special Districts,  
County of San Bernardino, California*

Michael Couzens Law Office  
Box 3642  
Oakland, CA 94609

Tel. (510) 658-7654  
cuz@well.com

December 6, 2021.



## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Review was sent to the following, by First Class Mail with postage fully prepaid, on January 6, 2021, and by e-mail as indicated below.

Barbara Kreisman, Chief  
Video Division, Media Bureau  
Federal Communications Commission  
45 L Street N.E  
Washington, D.C. 20554

Barbara.Kreisman@fcc.gov

/s/ Michael Couzens



---

Michael Couzens