



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

In the Matter of	)	EB Docket No. 02-21
)	
PENINSULA COMMUNICATIONS, INC.	)	File No. EB 01-IH-0609
	)	FRN: 0001-5712-15
Licensee of stations)	
KGTL, Homer, Alaska;	)	Facility ID Nos. 52152
KXBA(FM), Nikiski, Alaska;	)	86717
KWVV-FM, Homer, Alaska; and	)	52145
KPEN-FM, Soldotna, Alaska.	)	52149
)	
Licensee of FM translator stations)	
K292ED, Kachemak City, Alaska	)	52150
K285DU, Homer, Alaska;	)	52157
K285EG and K272DG, Seward, Alaska	)	52158 and 52160
)	
Former licensee of FM translator stations)	
K285EF, Kenai, Alaska;)	
K283AB, Kenai/Soldotna, Alaska;)	
K257DB, Anchor Point, Alaska;)	
K265CK, Kachemak City, Alaska;)	
K272CN, Homer, Alaska; and)	
K274AB and K285AA, Kodiak, Alaska)	

MEMORANDUM OPINION AND ORDER

Issued: May 23, 2002

Released: May 24, 2002

1. This is a ruling on Motion to Enlarge Issues (“Motion”) that was filed by Peninsula Communications, Inc. (“PCI”) on April 16, 2002.¹ Enforcement Bureau’s Opposition to Motion to Enlarge Issues by Peninsula Communications, Inc. (“Opposition”) was filed on April 26, 2002. A Reply by Peninsula Communications, Inc. (“Reply”) was filed on May 8, 2002.

¹ After the first prehearing conference that was conducted on March 12, 2002, the Presiding Judge ordered that any motion to add issues would need to be filed by April 16, 2002. See Order FCC 02M-18, released March 15, 2002. PCI has complied.

2. PCI seeks to add the following issue:

To determine whether the Federal Communications Commission has the authority to require Peninsula Communications, Inc. to cease the operation of FM translator stations² [the "FM Translators"], while the denial of the 1995 and 1997 license renewal applications for the stations is the subject of a timely appeal pending before the United States Court of Appeals for the District of Columbia Circuit; and/or without PCI first being served with an order to show cause why the operation of the translators should be terminated; and/or without PCI being given the opportunity to object to such a show cause order; and/or without PCI being given the opportunity to request an evidentiary hearing on such order to cease operation.

3. The Commission issued Order to Show Cause, FCC 02-32, released February 6, 2002, ("OSC") to determine in this formal hearing, the facts and circumstances surrounding PCI's continued operation of the FM Translators contrary to the Commission's Memorandum Opinion and Order to Show Cause of May 18, 2001, reported at 16 F.C.C. Rcd 11364 (2001) (the "Termination Order"), and to determine whether there was a related violation of §416(c) of the Communications Act of 1934 (the "Act").³

Procedural Background⁴

4. There seems to be no contesting of the fact that PCI was duly served with the Termination Order. The Termination Order recites that in November 1995, PCI filed license renewal applications for the FM Translators. In September 1996, upon completing review of petitions to deny, the staff concluded that PCI had operated the FM Translators in violation of Commission rules and refused to allow further waivers, but gave PCI the opportunity to file assignment applications within 60 days. In July 1997, PCI filed acceptable assignment applications. In November 1997, the staff granted the pending renewal applications conditioned upon consummation of the authorized assignments. The November 1977 staff decision also advised counsel for PCI that the failure to meet the divestiture condition would nullify the renewal grants.

² The seven FM Translator stations include: 285EF (Kenai); K283AB (Kenai/Soldotna); K257DB (Anchor Point); K265CK (Kachemak City); K272CN (Homer); K274AB and K285AA (Kodiak).

³ Section 416(c) of the Act provides that it is the duty of every person served with a Commission order to observe and comply with such order "so long as the same shall remain in effect."

⁴ Procedural background is recited here in order to provide context for a basis for the rulings below. It is not intended to be a comprehensive report of procedural history.

5. Parties opposing the renewals also opposed any assignments. Those parties requested reconsideration of the staff decision authorizing assignments and argued for revocation of the translator licenses. However, there were no allegations that PCI was not basically qualified to hold a license and so the Commission did not grant the reconsideration requests of the opposing parties. Nor did the Commission grant PCI's request for reconsideration of the refusal to grant further waivers. See Peninsula Communications, Inc., 15 F.C.C. Rcd 3293 (2000). In February 2000, PCI was given 30 days to comply with divestiture or its FM Translator license renewals would be rescinded and the operating authority for the translators would be terminated. Id. PCI then advised the Commission that the intended assignee had rescinded an earlier assignment agreement and asked the Commission for a stay pending appeal to the courts. The Commission did not grant the stay. Id.

6. In March 2000, PCI appealed to the United States Court of Appeals for the District of Columbia Circuit and asked for an emergency stay of the Termination Order. The Court denied the stay. PCI immediately filed with the Commission a pleading styled "Rejection of Conditional License Renewal and Assignment of License Grants." The Court dismissed PCI's appeal without prejudice to refiling depending on the Commission's ruling on the last pleading.

7. The Commission determined that by accepting conditional renewals and the passage of time, PCI waived its right to reject the conditions of assignment approvals and, therefore, the Commission terminated the licenses for PCI's failure to seek timely reconsideration. PCI seeks to return to the status quo ante before there were any conditional renewals and have its renewal applications put into hearing premised on 47 C.F.R. §1.110 (hearing required when conditions of grant are not accepted). Because the licenses already were deemed rescinded for failure to meet a condition that PCI had accepted more than two years earlier, the Commission held in the Termination Order that there is no right to a hearing on the merits of PCI's license renewals. PCI was ordered to terminate on May 20, 2001, and was cautioned that further operations may result in serious sanctions. See Peninsula Communications, Inc. 16 FCC Rcd 11364, 11370 - 71 (2001).

8. PCI did not cease to operate the seven Translator Stations. On August 29, 2001, the Commission issued a Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 16124 (2001). A subsequent Forfeiture Order was released on February 6, 2002, 17 FCC Rcd 2832 (2002), requiring PCI to forfeit \$140,000. The OSC also was released on February 6, 2002, and the Commission set this hearing on the fitness of PCI to remain a Commission licensee as to all of its broadcast and translator licenses. It appears that PCI still continues to operate the Translator Stations.

Discussion

9. The substantive issue under the OSC is to “determine the facts and circumstances surrounding Peninsula Communications, Inc.’s operation of former FM translator stations -- subsequent to August 29, 2001, ---.” April 16, 2002, was the deadline set for PCI to seek issues. See Order FCC 02M-18, released March 15, 2002.

10. Under Commission rules, an issue will be added only where there are “specific allegations of fact.” 47 C.F.R. §1.229 (d). Because the facts alleged by PCI are ascertainable in the record by official notice, an affidavit is not required. Id. However, the issue proposed by PCI is purely a question of law, while the purpose of adding post-designation issues is to resolve doubts as to questions of fact that require further inquiry to resolve. Astroline Communications Limited Partnership v. F.C.C., 857 F. 2d 1556, 1561 – 62 (D.C. Cir. 1988); Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F. 2d 392, 395 (D.C. Cir. 1985). Thus, a new issue will be added only where the added issue raises substantial and material questions of fact. Washoe Shoshone Broadcasting, 5 F.C.C. Rcd 5561 – 62 (1990). See also Amando Garcia, 3 F.C.C. Rcd 1065 (Review Bd 1988) (allegations must raise substantial question of fact); North Shore Broadcasting Corp., 10 F.C.C. 2d 163 (Review Bd 1967) (proposed issues dealing with questions of law are improper).

11. The new issue sought alleges a question of law that was fully considered by the OSC, and a presiding judge is not authorized to adjudicate legal issues that have been definitively resolved in a designation order. Atlantic Broadcasting Co., 5 F.C.C. 2d 717, 720 – 21 (1966); Ft. Collins Telecasters Partnership, 103 F.C.C. 2d 978, 983 – 84 (Review Bd 1986). Furthermore, a federal circuit court of appeals has recently held that the question of law which PCI seeks to interject into this proceeding can only be decided by the United States Circuit Court for the District of Columbia Circuit. See United States v. Peninsula Communications, Inc., No. 01 – 35965, Slip Op. (9th Cir., April 22, 2002). Finally, it is noted that substantially the same issue is now pending in the proper court for determination. Peninsula Communications, Inc. v. F.C.C., Case No. 01 – 1273 (D.C. Cir. June 15, 2001).⁵

12. But in its Reply pleading, PCI argues that there must be an inquiry into “the underlying facts and issues on whether the Commission’s order [to cease operations] was legally sanctioned.” To allow such “factual” inquiry under the proposed issue would open the proceeding to requests for discovery of documents containing deliberations of the staff.⁶ And as held above, there is no authority to inquire by added issue into a subject that was already considered and decided by the Commission.

⁵ Section 402(b)(2) of the Communications Act provides that an aggrieved party may appeal a Commission order denying license renewal to the D.C. Circuit.

⁶ There already is a contested discovery request by PCI for Commission documents, and the Bureau has recently filed a Motion to Compel Production of Documents Addressed to Peninsula.

13. However, PCI also contends that PCI was reasonable in forming a "belief," that was "reasonable and founded upon solid factual and legal grounds," that the Commission lacked authority to order termination of operations. Such belief, if proven to be reasonable (even if wrong) could possibly be a factor in determining culpability and/or mitigation. Consideration of such a defense would not require adding an issue. Proof in support of that assertion probably would include testimony of key executive(s), and possibly agent(s) of PCI which could raise questions of privilege and waiver of privilege.

14. The OSC requires a determination of "the facts and circumstances" regarding Peninsula's continued operations. Peninsula's state of mind would qualify for a "circumstance" on which evidence would be relevant. It is noted, however, that even relevant evidence can be excluded (or limited) if its probative value is outweighed by confusion, delay or waste of time. FRE 403. Therefore, it will be required that there first be an in limine ruling on allowing, limiting or rejecting such evidence. In order to seek to offer such proof, PCI would need to proffer its evidentiary intentions by motion so that the Bureau may oppose or comment and, if necessary, seek additional discovery for trial preparation.⁷

Order

Accordingly, IT IS ORDERED that the Motion to Enlarge Issues by Peninsula Communications, Inc. filed on April 16, 2002, IS DENIED.

IT IS FURTHER ORDERED that an appropriate Motion For Leave To Offer Proof with respect to state of mind defense, that includes identity of witnesses expected to testify, statement of the nature of testimony, and description or categories and volume of documents expected to be offered in evidence, MAY BE FILED AND SERVED by **June 5, 2002**.

FEDERAL COMMUNICATIONS COMMISSION⁸



Richard L. Sippel
Chief Administrative Law Judge

⁷ The Bureau already has served notice to take the deposition of Mr. David F. Becker, Peninsula's president, in Homer, Alaska on August 14, 2002.

⁸ Courtesy copies of this Order were faxed or e-mailed to Bureau counsel and to counsel for Peninsula on the date of issuance.