

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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JUN 20 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	EB Docket No. 02-21
	)	
Peninsula Communications, Inc.	)	
	)	File No. EB 01-IH-0609
Licensee of stations	)	FRN: 0001-5712-15
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
	)	
Licensee of FM translator stations	)	
K285EF, Kenai, Alaska;	)	52161
K283AB, Kenai/Soldotna, Alaska;	)	52155
K257DB, Anchor Point, Alaska;	)	52162
K265CK, Kachemak City, Alaska;	)	52154
K272CN, Homer, Alaska; and	)	52148
K274AB and K285AA, Kodiak, Alaska	)	52151 and 52164

To: Chief Administrative Law Judge Richard L. Sippel

MOTION FOR LEAVE TO OFFER PROOF WITH RESPECT TO STATE OF MIND

Peninsula Communications, Inc. ("PCI"), by its undersigned counsel, hereby respectfully submits this Motion outlining its intention to present a witness and various evidence at the hearing scheduled in this proceeding on the facts and circumstances surrounding its "state of mind" in continuing to operate the above-captioned FM translator stations subsequent to being ordered to terminate such operation by the

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Commission in the Memorandum Opinion And Order To Show Cause, FCC 01-159 (released May 18, 2001) (hereafter the 'Termination Order'). This Motion is submitted pursuant to the Presiding Judge's Memorandum Opinion And Order ("MO&O"), FCC 02M-42 (released May 24, 2002) allowing an appropriate motion for leave to offer proof with respect to PCI's state of mind defense, including the identity of witnesses expected to testify, a statement of the nature of the testimony, and a description or categories and documents expected to be offered in evidence.<sup>1</sup>

1. PCI is a corporation that is wholly owned by David and Eileen Becker, who are husband and wife. It is literally a "maw and paw" operator of the above-captioned AM, FM and FM translators stations. Mr. David Becker is the President and chief operating officer of PCI and has been responsible for the management, operation and maintenance of all of the PCI broadcast stations. He is also the person who has supervised all the FCC regulatory matters and other civil proceedings involving PCI and its above-captioned FM translator stations. PCI's "state of mind" in continuing to operate the FM translators subsequent to the Termination Order reflects Mr. Becker's state of mind in that regard.

2. PCI intends to present testimony and evidence at the hearing in this proceeding on its "state of mind" in continuing to operate its FM translator stations subsequent to the release of the Termination Order and the Commission's instructions therein to cease such operation by midnight on May 19, 2001. PCI will show that it believes the Commission lacks the statutory and other legal authority to order such a termination of operation under the facts and circumstances of this case, and that FCC legal policy and precedent, the

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<sup>1</sup> The original date for the submission of this Motion of June 5, 2002 was extended to June 20, 2002, pursuant to a request by PCI and the Presiding Judge's Order, FCC 02M-46, released on June 7, 2002.

public interest obligations of PCI, the provisions of the Communications Act of 1934, as amended, the stay issued by the United States Court of Appeals for the 9<sup>th</sup> Circuit in Case No. 01-35965<sup>2</sup>, and the proceeding before the United States Court of Appeals for the District of Columbia Circuit in Case No. 01-1273, among other things, have obviated the need for PCI to obey the order to terminate the operation of the translators, and fully justify the continued operation thereof by PCI.

3. The proposed testimony in support of this portion of its case would be presented by Mr. David Becker and is outlined in the attached "Statement of David F. Becker, President Peninsula Communications, Inc. For 'Motion For Leave To Offer Proof'".<sup>3</sup>

4. PCI anticipates at this point that the documentary evidence submitted in support of this testimony would include the following:

- a) Commission precedent allowing broadcast license applicants to continue the operation of their stations while petitions for review were pending before United States appellate courts, including: Application of Faith Center, Inc., 82 FCC 2d 1 (1980); Application of Pineland, Inc., 7 FCC Rcd 6058 (1992); Committee for Open Media v. FCC, 543 F.2d 861 (D.C. Cir. 2001) and Contemporary Media, Inc. v. FCC, 215 F.3d 187 (D.C. Cir. 2000), and underlying and related Commission decisions in those proceedings;

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<sup>2</sup> This stay was issued by the 9<sup>th</sup> Circuit on November 21, 2001, and it remains valid and in full force and effect at the present time. The mandate for the 9<sup>th</sup> Circuit's April 22, 2002, opinion vacating the stay, which was submitted by the Enforcement Bureau into the record herein, has not been issued as of this date, and a petition for rehearing by PCI is presently pending before the Court in that proceeding.

<sup>3</sup> The Enforcement Bureau has noticed Mr. Becker for deposition, and PCI has not objected to the deposition. There remains only the question of the site and date of the deposition.

- b) Various provisions of the Communications Act of 1934, as amended, the United States Code, and the Rules and Regulations of the FCC, including 5 U.S.C. sections 558, 588 and 706; 47 U.S.C. sections 307, 309, 311, 312, 401, 402, and 405, and 47 C.F.R. sections 1.62, 73.1740 and 73.1750.
- c) The Commission staff's October 25, 2001 decision In re WVIS (FM), Viegues, PR.<sup>4</sup>
- d) The application for review filed with the United States Court of Appeals for the District of Columbia Circuit in Case No. 01-1273, Peninsula Communications, Inc. v. FCC, and related pleadings and orders from the Court in that matter;<sup>5</sup>
- e) The "Petition For Panel Rehearing And Rehearing En Banc of Appellant, Peninsula Communications, Inc."<sup>6</sup> filed with the United States Court of Appeals for the Ninth Circuit in Case No. 01-35965, and related pleadings and orders in that proceeding;
- f) Listening audience ratings information from markets in which PCI operates its FM translators, and which show the popularity and the public need for the service provided by those stations in those communities<sup>7</sup>;
- g) The Commission's Report and Order in MM Docket 88-140, 5 FCC Rcd 7216 (1990), and related orders, involving the modifications in the FM translator

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<sup>4</sup> This is appended to Mr. Becker's statement.

<sup>5</sup> PCI's pleadings before previously served on the Commission.

<sup>6</sup> This is appended to Mr. Becker's statement.

<sup>7</sup> An example for the Kenai Peninsula is appended to Mr. Becker's statement.

rules that the Commission alleges affected the operation of the PCI translators and which justify its actions in the subject proceeding;

- h) The Commission decision in Wrangell Radio Group, Inc., 75 FCC 2d 404 (1980), under which all of the PCI translator authorizations for the above-captioned stations were approved with waivers of the FM translator rules to allow for their present modes of operation, and the applications and licenses issued in connection with those stations;

5. PCI would not propose to submit the contents of entire dockets into the record of this proceeding. Rather, it would offer documents from each of the above categories that most completely reflect the information relied upon by PCI in that proceeding in reaching its decision to continue the operation of its translators.

6. The purpose of offering this testimony and evidence would be to show the reasons and justifications for PCI not obeying the Commission's Termination Order to cease the operation of the subject FM translators on May 19, 2001. As noted in Mr. Becker's statement, PCI is a longstanding Commission broadcast licensee who has never had any intention of acting in a 'defiant' manner in its dealings with the Commission. Rather, PCI has been forced by the Commission to take its present posture in connection with the operation of its FM translators because the Commission's actions are contrary to law, and because PCI's obedience to the requirements of the Termination Order would have effectively denied it the ability to seek court review of the order. Among these reasons is the startling reality that had PCI obediently ceased its operation of the subject FM translators on May 19, 2001 in response to the Termination Order, its licenses for those translators would have terminated as a matter of statutory law on May 18, 2002, in

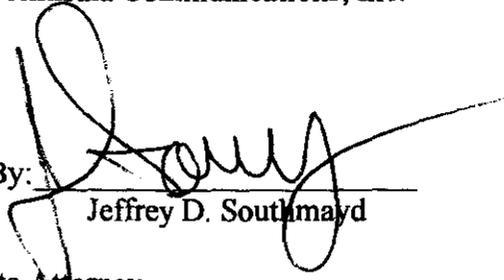
accordance with the provisions of 47 U.S.C. 312(g), and PCI's appeal before the D.C. Circuit would have been rendered moot since neither the Court nor the Commission could reinstate the licenses after that date.

7. PCI's belief that the Commission lacked the authority to order the termination of the operation of the translators, and the bases for that belief, are directly relevant to the "facts and circumstances" under which PCI has continued to operate the stations. As such, the proposed testimony and evidence would be relevant, and of probative value, to a full inquiry of the matters before the Presiding Judge in this proceeding.

WHEREFORE, PCI respectfully submits this Motion and associated showing as an offer of proof in connection with this proceeding in response to, and conformity with, the Presiding Judge's order.

Respectfully submitted,

Peninsula Communications, Inc.

By: 

Jeffrey D. Southmayd

Its Attorney

Southmayd & Miller  
1220 19<sup>th</sup> Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 331-4100  
jdsouthmayd@msn.com

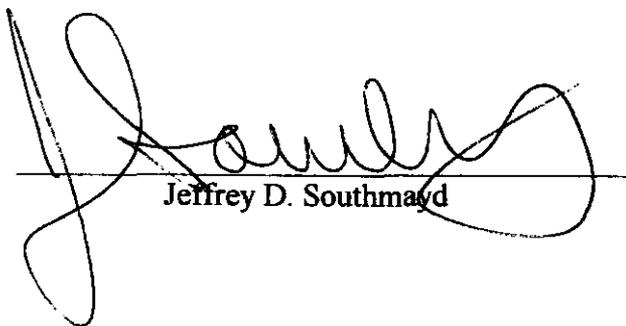
Date: June 20, 2002

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by first class United States mail, postage pre-paid, and email on this 20th day of June, 2002, to the following:

Chief Administrative Law Judge Richard L. Sippel  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 1-C749  
Washington, D.C. 20554

Mr. James Shook  
Investigations & Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W. Room 7-C723  
Washington, D.C. 20554



Jeffrey D. Southmayd

STATEMENT OF DAVID F. BECKER, PRESIDENT  
PENINSULA COMMUNICATIONS, INC.  
FOR  
"MOTION FOR LEAVE TO OFFER PROOF"

This statement is offered by David F. Becker, President of Peninsula Communications Inc. ("PCI") in response to Judge Richard Sippel's Order FCC-02M-42 regarding Peninsula's state of mind in refusing to terminate operation of the subject seven FM translator stations which has precipitated the Order to Show Cause (OSC) of this proceeding.

As a preliminary matter, PCI has been characterized by the Commission as "defiant" with regard to the order to immediately terminate operation of the subject translators (the "Termination Order"). This is not the case. As will be shown, PCI has been "forced into a position of having to disobey a Commission Order because it is contrary to the Commission's own rules and regulations, the Commission's well established policies in license renewal situations, and in order to protect and defend PCI's right to appeal and to have its case decided by the D.C. Circuit Court of Appeals. The Commission's actions in this case, since 1996, have been to routinely deny PCI the right to "Due Process" by refusing PCI various required notices and hearings, with opportunity to object to the Commission's actions, as clearly provided for in the Communications Act of 1934 (as amended). These actions are the subject of PCI's appeal before the D.C. Circuit. **It is the viability of this appeal which PCI has been forced to protect and defend.** PCI will show that the FCC has created a "Catch 22" situation by ignoring the intent of Congress in Section 307(c)(3) and Section 312(g) in the revised Telecommunications Act of 1996, which makes compliance with the Commission's Termination Order impossible, without forfeiting the right to prosecute its appeal before the D.C. Circuit if PCI were to take its FM translator stations silent for more than 12 consecutive months. The appeal would become moot because the "corpus" of the appeal, which are the station licenses would no longer exist after 12 months of silence. There is no provision for the Commission or the Courts to restore the licenses after 12 months of silence. It expires as matter of law... automatically and forever. In PCI's case it has already been 13 months (May 19, 2001 to June 19, 2002) since the Commission order to cease operation of the subject translators...and had PCI ceased the operation of the translators on that date, its licenses would have ceased to exist as of May 18, 2002. PCI is convinced that the Commission would have immediately filed a "Motion to Dismiss" our appeal before the D.C. Circuit on this basis alone... had PCI ceased operation on May 19, 2001, as required in the Termination Order. Simply stated, PCI had no alternative but to continue its operation of the translators while its appeal was pending before the D.C. Circuit or it would have run the risk of rendering its case and its appeal "moot" through the automatic, statutory termination of the licenses after 12 months.

To further understand this problem it is necessary to look at both Sections 312(g) and 307(c)(3) of the Act.

Section 312(g) provides as follows:

“If a broadcasting 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 a recent station license cancellation decision by the Commission (see WVIS(FM) cancellation letter attached) a station’s license was ordered to be forfeited for being silent for more than 12 months. This involved a case where a station attempted to stay on the air but claimed that a lack of FCC staff action on an application left the station believing that it could temporarily suspend operations. Nevertheless, the FCC cancelled the license after 12 months of silence. **The Commission ruled that it could not ignore the statutory requirement that Congress imposed when it mandated that a license *automatically* expires if a station is silent for 12 consecutive months. Failure to operate at all for 12 months is fatal, and the FCC has no discretion to forgive compliance or waive the rule.**

Section 307(c)(3) provides as follows:

“ Terms of Licenses.—

(3)CONTINUATION PENDING DECISION.—Pending any hearing and final decision on such an application and the disposition of any petition for rehearing **pursuant to section 405, the Commission shall continue such license in effect** (emphasis added)

PCI timely filed an appeal with the D.C. Circuit as provided for under Section 402 of the Act. The subject translator licenses *continue in effect pending the outcome of the appeal, as does PCI’s authority to continue to operate its translators*. This is because Section 405 provides for filing of petitions for reconsideration of Commission action. However, 405(a) states that: “The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, or action....”. Therefore, it is not necessary to file a petition for reconsideration before seeking judicial review. Furthermore, Section 405B)(2) also specifies that appeals taken under Section 402(a) come within the scope of Section 405(b)(2). Therefore, under Section 307(c)(3) PCI has FM translator licenses which continue in effect, pending a final decision on PCI’s applications for license renewal, including the “finality of a decision” which extends through to completion of judicial review, even to the U.S. Supreme Court.

PCI's licenses, and its right to continue to operate the FM translators, remain valid under the above-referenced provisions of the Act, which require that the FCC continue the licenses in effect until a final decision is reached. Thus, the FCC action in the Termination Order requiring PCI to cease operation of its FM translators also became null and void upon the timely filing of the notice of appeal because the licenses to operate "continued in effect".

PCI has been faulted by the Commission for not seeking a stay of the May 18, 2001 MO&O. However after issuing the Termination Order, the Commission immediately began enforcement proceedings by seeking an injunction to terminate PCI's translator operation in the Alaska District Court. PCI found itself defending its right to remain on the air in Federal District Court, Anchorage, Alaska. Subsequently, Judge John W. Sedwick issued an order and entered a preliminary injunction to cease operation. PCI appealed that decision to the Ninth Circuit Court of Appeals in San Francisco. The Ninth Circuit Appeals Court stayed Sedwick's order. After 9 months, the court rendered a Slip Opinion in favor of the FCC, but the court has not issued a mandate lifting the stay as of this date. PCI timely filed a Petition for Panel Rehearing and Rehearing En Banc on June 5, 2002, (see attached exhibit). This effectively maintains the stay in place while the Ninth Circuit decides the question of Rehearing, before issuing a mandate, stay or dismissal. Thus, a Federal Court has effectively stayed the FCC's order for PCI to terminate operation of its translators to date. As a result, PCI has deferred seeking a stay from the D.C. Circuit Court of Appeals, until such time as the matter before the Ninth Circuit is finalized. The Ninth Circuit could reverse itself on Rehearing or confirm its opinion and issue an injunction and mandate to cease operation. PCI will need to wait to see what the Ninth Circuit will do. If the court issues a mandate to cease operation, then PCI will seek a stay from the D.C. Circuit at that time. The "reality" of the situation is this .... whether PCI receives a stay or not... PCI has the right to remain on the air pending "finality of judicial review" as authorized by Section 307(c)(3) of the Act. The result of being off the air for more than 12 consecutive months moots PCI's appeal before the D.C. Circuit. PCI also notes that receiving a stay from any court is not automatic. In any event, PCI must remain on the air in order to keep PCI's licenses valid in order to protect the corpus of the appeal before the D.C. Circuit. Moreover, this clearly illustrates the "Catch 22" Congress apparently unintentionally created with the 12 month expiration statute. In PCI's case, when the FCC issued an (unlawful) order to terminate operation... PCI was forced to gamble whether an appeal proceeding would take more than 12 months to complete (something impossible to predict), and then decide if obeying the order would eventually forfeit an appeal if it exceeded 12 months. PCI guessed at the outset that an appeal before the D.C. Circuit most likely would take a minimum of at least one year, and more likely two or three years to complete "finality". To date, it has already taken more than 13 months. Surely Congress never intended for a licensee to caught in such a conundrum! Yet, here we are. Nevertheless, PCI believes that it continues to have the authority to operate its translators while its appeal is pending before the D.C. Circuit.

The next issue is the “legality” of the Termination Order. PCI believes the May 18, 2001 MO&O is illegal and will not withstand judicial review for a number of reasons:

1) PCI timely filed a Section 1.110 “Rejection” of the February 14, 2000 MO&O. The FCC dismissed the “Rejection” as untimely filed. However, the PCI Rejection was, in fact, timely for the following reason. The February, 2000, MO&O terminated the signal delivery waivers of PCI’s Seward translator stations in 60 days, or by April 14, 2000. This action effectively modified PCI’s Seward translator licenses without the FCC issuing a show cause order, and contrary to the provisions of Section 316 of the Act. Section 316 provides for notice and the issuance of an Order to Show Cause whereby the holder of the license is afforded an opportunity to protest the license modification. The FCC order skipped the 316 procedure and summarily terminated the signal delivery waivers without notice or opportunity for PCI to protest.

The following May 18, 2001, MO&O acknowledged this mistake and attempts to correct the error by issuing an OSC for the two Seward translators “pursuant to Section 316 of the Act”. Therefore, this proves PCI’s contention that PCI’s 1.110 Rejection was in fact “timely”. Under the provisions of Section 1.110, PCI was entitled to a hearing on the February, 2000, MO&O. The FCC illegally denied PCI “due process” by erroneously dismissing PCI’s Rejection as untimely and denying the required hearing. This is one of the bases for PCI’s request for a remand before the D.C. Circuit.

2) The FCC policy is and has always been to permit a licensee to continue to operate pending completion of an appeal. This policy is based on Section 307 of the Act. This policy has been articulated by the FCC as follows:

“Generally, we permit a disqualified broadcast licensee to continue operations during judicial appeals to ensure service to the public until the court resolves the licensee’s qualifications. See Pinelands, Inc., 7 FCC Rcd 6058, 6061 n.12 (1992)....” Footnote 10, FCC 02-32.

Although, the FCC would imply that the Commission has discretion to decide who can and who cannot operate during judicial appeals...no such discretion can be found either in the Act or in FCC Rules or FCC policy. In fact, since the beginning of the Communications Act in 1934, there has never been a case where a licensee was denied the right to continue operation pending appeal of the denial or dismissed license renewal application...except, of course, in PCI’s case. Moreover, all the past case law favors continued operation. See for example, the Application for Faith Center, Inc., 82 FCC 2d 1, 40 (1980), Application for Pinelands, Inc., and more recently, the case of Contemporary Media, Inc. v F.C.C., 215 F. 3d 187 (D.C. Cir. 2000). The Contemporary Media case is especially noteworthy because it involved a heinous crime of sexual abuse of children with a convicted felon and license revocations in 1997. Michael Rice, the principal owner of Contemporary Media, was allowed to continue operation until nearly the end of 2001, ( nearly four years) pending “finality”, which included an appeal to the

U.S. Supreme Court (which subsequently was denied). Even after finality, Rice (the licensee) was given another 90 day extension with an STA authorization to continue to operate. In contrast, PCI was ordered off the air within one day.... without notice. Moreover, the Commission determined that..."in light of the record, it would have been inappropriate for the Commission to give PCI continued authority to operate". This determination has no basis in law... the FCC has no such discretionary powers... and the FCC cannot deny PCI the authority to operate pending judicial review. In accord with 5 U.S.C. Section 706, a government agency is not permitted to regulate "arbitrarily and capriciously". PCI intends to seek judicial review of this FCC action which PCI believes to be unlawful.

3) The FCC faults PCI for first agreeing to divest, then failing to consummate the sale to Coastal Broadcast Communications, Inc.(CBCI). However, the Commission has yet to acknowledge its role in undermining PCI's agreement with Coastal. PCI could have completed the transfer in 1997 when the first Consent to Assignment was granted. However, the Commission ADDED the condition that the Consent was dependent on the next round of license renewals in 1998. This effectively delayed the possible sale for an additional two years....something the buyer was unprepared for financially. Mr. David Buchanan, President of assignee CBCI, took an early retirement from his job with the State of Alaska... losing at least \$100,000 to \$150,000 in lost wages over 3 years of waiting on the FCC to resolve the matter, plus about \$10,000 in corporate costs and losses. Mr. Buchanan's patience was wearing thin by the time the February, 2000, Order came out... only to find that four of the nine translators were of diminished or no value because the Commission refused to grant a signal delivery waiver for the two Kodiak translators to restore lost service and simultaneously **unlawfully** terminated within 60 days the signal delivery waivers of the two Seward translators. CBCI refused to pay the original agreed upon purchase price (for good reason)... and PCI could not in good conscience sell Coastal translators which had little or no value as a result of the FCC's interference with the terms of the sale. PCI was committed to deliver unencumbered licenses which it was unable to do, as a result of the February, 2000, Order.

PCI's purchase agreement with CBCI provides in Section 2.2 that PCI will convey the assets of the translators to Coastal free and clear of any liens or encumbrances. Moreover, Section 5.1(f) of the Agreement specifically required that on closing:

**(f) There shall not be pending or threatened on the Closing Date any action by the Commission or any court or other government or regulatory authority to revoke, refuse to renew, or modify to Buyer's detriment any of the Commission authorizations....**

The termination of the waivers for signal delivery for the Seward translator in February, 2000, and the subsequent OSC issued in the May 2001 Termination order guaranteed that PCI could not consummate the Assignment to CBCI. This was never the fault of PCI, but the Commission bears the full blame for PCI's inability to complete the transfer.

Next, in the May 2001 Order the Commission determined that...“a sale will never take place” while simultaneously issuing the OSC to remove PCI’s waivers for signal delivery for the Seward translators. The Commission apparently does not get it.....How is PCI supposed to find a buyer who wants to buy translators which are potentially headed for extinction? And furthermore, any buyer who looks at the record in this proceeding would have grave doubts about when the FCC will next “pull the rug out” from under a licensee.

4) The D.C. Circuit Court of Appeals has asked for briefing before a Merits Panel with its January 7, 2002, Order questioning whether the May, 2001, Order is a “final FCC order” and whether the case should be immediately remanded to the FCC. Oral Arguments are set for January 14, 2003. The parties are directed to brief the effect on the Court’s jurisdiction by the ongoing agency proceedings mandated by the FCC May 18, 2001, Order. More specifically, the parties are directed to address the effect of any proceedings pending before the FCC on the Court’s jurisdiction over PCI’s challenge to the FCC refusal to renew the licenses of the non-Seward stations.

The Court has previously stated in the July 11, 2000, Order No.00-1079...”An agency action cannot be considered nonfinal for one purpose and final for another... Thus, once a party petitions the agency for reconsideration of an order or **any part thereof, the entire order is rendered nonfinal as to that party**” (emphasis added). PCI has timely filed a Protest to the Modification of its Seward licenses in response to the FCC’s OSC why it should not modify PCI’s Seward licenses. Therefore, if the D.C. Circuit determines the Commissions action to be “non-final”, PCI undisputedly had the absolute right to continue operation until “finality” by virtue of both Section 307(c)(3) of the Act, as well as pursuant to 47 C.F.R. Section 1.62(a)(1), which provides:

“ Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license with respect to any activity of a continuing nature, in accordance with the provisions of section 9(b) of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application.”

Whether the May, 2001, FCC decision is a “final determination” is a matter yet to be determined by the D.C. Circuit. If the Court determines the order to be nonfinal, and PCI believes that this is likely... sadly this whole exercise in this proceeding will have been a total waste of time, effort and money for the parties and the presiding judge.

5) The Commission has determined that it did not need to afford PCI "notice or a hearing" prior to dismissing PCI's applications for license renewal pursuant to Section 309 of the Act, FCC 01-159 paragraph 13. The FCC cites P & R Termer v FCC, 743 F.2d 918, 928 (D.C. Cir. 1984 (termination of license for failure to meet license condition did not require hearing)). However, an examination of this case citation reveals it is not a license renewal case at all! The P&R Termer case involved companies which had been granted authorizations to operate 20-channel trunked specialized mobile radio communication systems. The companies only built 5 of the authorized 20 channels... and the Commission ultimately revoked 15 of the 20 authorizations because of failure to load more than 5 channels within a two year required deadline. This case has no relevance to PCI's license renewal case. The FCC claims it did not revoke PCI's licenses, but rather dismissed PCI's license renewal applications pursuant to Section 309 of the Act. However, 309 (k)(3) clearly defines Broadcast Station Renewal Procedures. Under paragraph (1), the standards for renewal are:

"If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station during the proceeding term of its license-

- (A) the station has served the public interest, convenience, and necessity;
- (B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and
- (C) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern abuse."

PCI clearly passed this criteria in 1996 when filing for renewal of all of its FM translator licenses. There is no other statutory procedure or basis for measuring whether a licensee meets the standard. The standard for denial is likewise clearly defined:

(3) Standard for Denial—If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e), that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall--

- (A) issue an order denying the renewal application filed by such licensee under section 308;"

PCI believes the May, 2001, Order is also unlawful in this regard because:

- a) The FCC order does not follow the Section 309 procedure of the Act. There is no provision for "dismissing an application for renewal". The Commission must either **grant..or deny** the renewal after holding a license renewal hearing. The Commission can only consider the standard set forth in 309(k)(3) for denial; and
- b) if denied, must give "notice and opportunity for a hearing as provided...."; and
- c) there are no provisions for "adding conditions to a license" at renewal time.

The Commission erred on all three points, plus it did not follow the provisions of Section 316 of the Act when seeking to modify PCI's licenses by adding even more new conditions with each new MO&O. Other than originally agreeing to divest, PCI has never accepted any of the additional new conditions placed on PCI license renewals. Furthermore, PCI was never accorded "notice and an opportunity for a hearing" as specified in Section 309. This is yet another vivid denial of PCI's right to "due process".

6) PCI is entitled to the protections of 5 U.S.C. Section 558(c) in these proceedings. 47 U.S.C. 312 deals with the revocation proceedings, 47 U.S.C. Section 312(c), with respect to cease and desist orders, provides:

The provisions of section 558(c) of title 5 which apply with respect to the institution of any proceeding for the revocation of a license or a permit shall also apply with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

The Commission claims it did not revoke PCI's licenses.....yet the FCC action *effectively* revokes the licenses by cutting short the license terms. The data base for the FCC reflected that PCI had license terms in effect until February 1, 2006. When these terms were cut short, that is a license "revocation".

Section 312 (c) provides:

"Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after receipt of such order, and give evidence upon the matter specified therein:"

PCI was denied the provisions of this section with regard to an OSC, or a cease and desist order and opportunity for a hearing. Whether the May, 2001, MO&O was in fact a "license revocation" is a designated issue before the D. C. Circuit and will be decided later. The Commission is at fault for issuing an Order wherein the action taken does not clearly conform to any of the provisions of the Communications Act and the licensee is left to decipher whether its licenses were revoked... not renewed... or its renewal applications "dismissed". It should not be necessary to file an appeal with the D.C. Circuit in order to clearly understand what action the Commission in fact undertook in its order.

7) The Commission claims in the Termination Order that PCI has operated its subject translators... "illegally since June 1, 1994". This is simply false. PCI held valid licenses good thru the February 1, 1996 renewal cycle, with licenses which continue in effect pending finality of a decision and judicial review. The Commission bases its belief on the Report and Order in MM Docket 88-140, 5FCC Rcd at 7216(1990). However, the Commission still to this day refuses to acknowledge the validity of "footnote number 59" of the Order:

"We intend that our decisions herein not alter in any fashion the special treatment we accord Alaska. Wrangell Radio Group, Inc. 75 FCC 2d 404 (1980). Upon appropriate showing the Commission has accommodated Alaska's unique lack of adequate communications services by granting waivers allowing program origination, alternative signal delivery, and cross-service translating."

PCI sought and obtained all necessary Wrangell Radio Group "waivers" when licensing all of PCI's subject translators. PCI strongly disagrees with the Commission determination that PCI's translators are "out of compliance". The footnote 59 clearly provides for an "Alaskan Exception"... which the FCC granted in all of PCI's license authorizations (either explicitly or implicitly). This issue has been designated in PCI's appeal before the D.C. Circuit and will be determined at a later date. However, the FCC characterization that PCI has been operating illegally since June 1, 1994 is simply false. Moreover, the Commission's contention that it only licenses translators in areas with a "white area showing"... is also false.

PCI can demonstrate that there are a number of cases of the Commission licensing FM translators in Alaska in "non-white" areas both before and after June 1, 1994. To PCI's knowledge, PCI has been the Commission's only target for "compliance" in Alaska. Furthermore, this FCC action will be reviewed for an "arbitrary and capricious act of regulation" by a Federal agency, contrary to 5 U.S.C. Section 706, by the D.C. Circuit in PCI's appeal. It is PCI's belief that under "Footnote 59" ... PCI should not be required to divest at all. PCI will seek consideration and resolution of this issue in its appeal before the D.C. Circuit Court.

Finally, the Commission has completely ignored the public interest in this matter. PCI recently received Arbitron Audience Measurements and Station Ratings for 2002, Kenai Peninsula County Coverage. Appended to this statement are the latest results. Briefly, the Arbitron Survey reveals that KWVV-FM and KPEN-FM (via FM translators) are ranked number one and number two respectively. Average Quarter Hour Share are 26.9 % and 17.1%, respectively. Weekly Cume audience is 13,000 and 11,000 cume persons, respectively. The next station ranked number 3 has an AQH of 5.1% and cume of 5000 persons. The survey covers Monday -Sunday, 6 am to 12 midnight, persons 12 plus.  
(copywrited by Arbitron).

In ordering the termination of operation, the Commission has failed to consider the disruption to the audience or the loss of valuable service that these two stations provide to the Kenai Peninsula and Kodiak Island audiences through carriage on FM translators. PCI has operated these FM translator stations in some cases for as long as eighteen years. It makes absolutely no sense to destroy this service which PCI has pioneered to many Alaskan communities as either a "first- or second-time commercial FM service". PCI is also defending these stations for the benefit of the listening public... which the FCC evidently could not care less about. PCI has submitted literally hundreds, if not thousands, of Petition signatures and letters of support from the public, which the Commission has all but ignored so far in this matter.

In consideration of all the above, and for the reasons given, PCI has not terminated the operation of the subject translators, contrary to the unlawful order of the FCC to do so. PCI believes under the circumstances surrounding this case, that it has the statutory authority to remain on the air pending completion of PCI's appeal before the D.C. Circuit and "final" decision in this matter. PCI believes that the Commission does not possess the statutory authority to terminate PCI's operation during judicial review based on the Communications Act as amended, or based on case precedent or FCC rules and regulations for all of the reasons stated herein.

I hereby declare under penalty of perjury, that the facts contained herein, except for those which official notice may be taken, are true and correct to the best of my personal knowledge and belief.

Date: June 19, 2002

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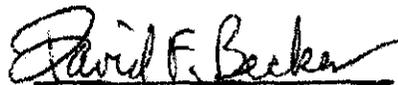
David F. Becker, President  
Peninsula Communications Inc.

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I hereby declare under penalty of perjury, that the facts contained herein, except for those which official notice may be taken, are true and correct to the best of my personal knowledge and belief.

Date: June 19, 2002



David F. Becker, President  
Peninsula Communications Inc.

STATEMENT OF DAVID F. BECKER  
EXHIBIT NO. 1

WVIS(FM) TERMINATION LETTER

**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

**In Reply Refer To**  
**1800B3-GDG/CNM**

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

James L. Oyster, Esq.  
108 Oyster Lane  
Castleton, VA 22716-2839

In re: WVIS(FM), Vieques, PR  
Facility ID No. 69631

File No. BPH-20010411AAD  
Application for Minor Modification

File No. BSTA-20010413AAX  
Request for Technical Special  
Temporary Authority

Dear Mr. Oyster:

This letter concerns: (1) the referenced application filed April 11, 2001 by V.I. Stereo Communications Corp ("VISC"), licensee of FM broadcast station WIVS(FM), Vieques, Puerto Rico, for minor modification of its outstanding construction permit BPH-19970116IF, (2) the referenced request filed April 13, 2001 for technical special temporary authority to operate with the facilities specified in its pending application, and (3) informal objections filed March 3, 2001 by Rafael Encarnacion and May 11, 2001 by Aureo A. Matos regarding the station's past and proposed operations.

Section 403(l) of the Telecommunications Act of 1996<sup>1</sup> provides that "if a broadcasting 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." *See Implementation of Section 403(l) of the Telecommunications Act of 1996 ("Implementation Order")*, 11 FCC Rcd 16599 (1996); *see also* 47 C.F.R. § 73.1740(c).

In your October 18, 2001 response to our September 5, 2001 inquiry regarding the station's operational status, you indicate that the station "has been off the air for more than 12 consecutive months, since December 22, 1999." You argue, however, that under Section 403(l) only the station's former authorization in Christiansted, St. Croix, Virgin

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<sup>1</sup>Pub. L. No. 104-104, 110 Stat. 56 403(l)(1996), *codified in* 47 U.S.C. §312(g) and 47 C.F.R. §73.1740(c).

Islands should expire and that its permit to modify the station's facilities in Vieques, Puerto Rico should remain valid. We disagree. When a station's license expires pursuant to Section 403(I), all of its associated authorizations expire concurrently. *Implementation Order*, 11 FCC Rcd at 16601. Similarly, associated applications become moot.

As the station has been off the air since December 22, 1999, the Commission's public and internal databases will be modified to indicate that the broadcast license (File No. BLH-19870114KB) for station WVIS EXPIRED as a matter of law as of 12:01 a.m., December 23, 2000. Consequently, we HEREBY DELETE the station's call sign WVIS(FM) and DISMISS AS MOOT VISC's application for minor modification (File No. BPH-20010411AAD), VISC's request for technical special temporary authority (File No. BSTA-20010413AAX), and the informal objections filed by Messrs. Encarnacion and Matos.

Finally, we note that it is imperative to the safety of air navigation that any prescribed painting and illumination of the station's tower be maintained until the tower is dismantled. Accordingly, the owner of the tower where the referenced station's transmitting antenna is located is required, pursuant to 47 U.S.C. § 303(q), to maintain the tower in the manner prescribed by our rules and the terms of the cancelled license. *See* 47 C.F.R. §§ 17.1 *et seq.* and 73.1213. *See also, Report and Order* in MM Docket 95-5, 11 FCC Rcd 4272 (1996).

Sincerely,

Peter H. Doyle  
Chief, Audio Services Division  
Mass Media Bureau

cc: Rafael Encarnacion  
1194 Mancha Real Dr.  
Orlando, FL 32807

Aureo A. Matos  
P.O. Box 7  
Moca, PR 00676

William D. Silva, Esq.  
5335 Wisconsin Avenue, N.W.  
Suite 400  
Washington, D.C. 20015-2002

STATEMENT OF DAVID F. BECKER  
EXHIBIT NO. 2

KENAI PENINSULA RADIO RATINGS INFORMATION

# Arbitron Radio



## Survey



### THANKS KENAI PENINSULA !!

FOR THE SECOND YEAR IN A ROW, PENINSULA RADIO GROUP BEATS THE COMPETITION FOR PENINSULA-WIDE AUDIENCE. HERE ARE THE LATEST ARBITRON RADIO SURVEY RESULTS\* for Average Quarter Hour Share (AQH) and Cume Persons.

	AQH SHARE		CUME PERSONS	
	<u>2002</u>	<u>2001</u>	<u>2002</u>	<u>2001</u>
K-WAVE (KWVV)FM	26.9 %	18.4 %	13,900	10,500
KPEN-FM	17.1 %	15.8 %	11,000	14,000
K-BAY (KXBA) FM	5.1 %	9.2 %	5,000	8,200
KGTL (AM)	4.4 %	9.2 %	3,100	1,800
<b>TOTAL COMBINED</b>	<b>53.5 %</b>	<b>52.6 %</b>	<b>33,000</b>	<b>34,500</b>

Our competition:

	<u>2002</u>	<u>2001</u>	<u>2002</u>	<u>2001</u>
KSRM (AM)	2.6 %	7.9 %	3,800	8,800
KWHQ-FM	2.2 %	2.6 %	3,300	7,300
K-KIS (FM)	1.9 %	- %	5,600	700
KSLD (AM)	0.4 %	- %	1,300	-

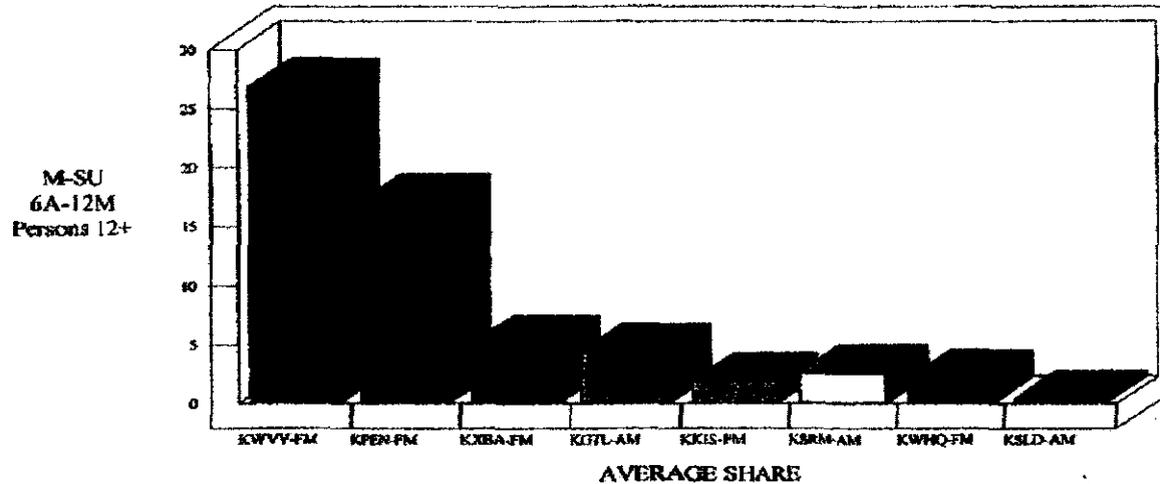


\* Copyrighted Arbitron Company 2002. Released 5/01/2002. Audience Estimates are 12+ persons, Monday-Sunday, 6 am- 12 Midnight. County Coverage for the Kenai Peninsula. The unauthorized use of any Arbitron data constitutes copyright infringement which could subject the infringer to statutory damages of up to \$150,000 and criminal penalties of up to one year imprisonment and a \$25,000 fine pursuant to Chapter 5, Sections 504 and 506 of Title 17 of the U.S. Code.

### Kenai Peninsula -Only 2002 County Coverage

**M-SU 6A-12M**  
**Persons 12+ — Population:39,800**  
**Selected Stations Ranked by: AVERAGE PERSONS**

Arbitron Radio Survey



STATIONS	AVERAGE PERSONS	AVG RTG	AVG SHR	CUME PERSONS	CUME RTG	TSL (QH)	TURN OVER	AVG COMP
1 KWVV-FM	1,400	3.5%	28.9%	13,900	35.0%	50.6	10.0	100.0%
2 KPEN-FM	900	2.2%	17.1%	11,000	27.5%	40.9	12.3	100.0%
3 KXBA-FM	300	0.7%	5.1%	5,000	12.8%	28.7	18.9	100.0%
4 KGTL-AM	200	0.6%	4.4%	3,100	7.9%	36.5	13.8	100.0%
tie KKIS-FM	100	0.2%	1.9%	5,800	14.2%	8.8	57.6	100.0%
6 KSRM-AM	100	0.3%	2.6%	3,800	9.5%	17.7	28.4	100.0%
tie KWHQ-FM	100	0.3%	2.2%	3,300	8.3%	17.6	28.6	100.0%
tie KSLD-AM	0	0.1%	0.4%	1,300	3.4%	8.3	60.9	100.0%
<b>MARKET LEVEL:</b>	<b>5,200</b>	<b>13.1%</b>		<b>37,800</b>	<b>94.4%</b>	<b>69.7</b>	<b>7.2</b>	<b>100.0%</b>

Note: County Coverage data from these counties: KENAI PENINSULA.