



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

FCC 02M-52
01246

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: June 18, 2002

Released: June 20, 2002

Background

1. This is a ruling on Motion to Compel Production of Documents (“Motion”) that was filed by the Enforcement Bureau (“Bureau”) on May 22, 2002. Peninsula Communications, Inc. (“PCI”) filed its Opposition to the Motion to Compel Production of Documents (“Opposition”) on May 31, 2002.

2. The Commission issued Order to Show Cause, FCC 02-32 , released February 6, 2002, to determine the facts and circumstances surrounding PCI’s continued operation of seven FM translator stations contrary to Commission order, and to determine related possible violation of §416 (c) of the Communications Act.

3. For purposes of discovery and trial preparation, on April 16, 2002, the Bureau served PCI with a Request for Production of Documents in seventeen categories. On May 15, 2002, PCI responded wherein PCI objected to Requests Nos. 1 – 11, 12 – 15, and 17.

Relevant Time Frame

4. The time frame for document requests specified by the Bureau is **January 1, 2000, to the present.** That time frame is reasonable.

Discovery Standards

5. The Commission's Rules provide for discovery that is "reasonably calculated to lead to the discovery of admissible evidence." 47 C.F.R. §1.311(b). The Bureau contends that it has shown good cause for the documents. 47 C.F.R. §1.325(a) (documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged and which meet the relevancy test of §1.311).

Station Maintenance Documents

6. Document Request No. 1 asks for: All documents relating to the maintenance of each Station's technical operations or the supervision of such activities, grouped by Station, including all documents relating to communications between PCI and any personnel involved in maintaining each Station's technical operation.

7. Literally, such a comprehensive request for all documents relating to the maintenance of the seven stations relate to the designated issue to determine "facts and circumstances surrounding [PCI's] operation of [the seven] former translator stations." The Bureau seeks to determine a comparison of the stations' operations before and after August 29, 2001, the date that the Commission's termination order became effective. The Bureau asserts that such before and after evidence would tend to show any changes in operations made by PCI as a result of the Commission's termination order and a federal district court's injunction. The Bureau further argues that a comprehensive discovery of operational documents would lead to discovery of witnesses who would be competent to testify regarding "PCI's translator operations and/or character."

8. PCI argues the difficult and time consuming process that would be required for compliance. PCI also argues that the request is so broad that it would require production of maintenance documents for its full power AM and FM stations which stations PCI argues are not relevant to the case.

9. The rules allow for FM translators to provide FM signals for areas where reception is unsatisfactory within the authorized predicted service contours of the primary station. 47 C.F.R. §74.1231. Adequate translator station records must be maintained, including maintenance records. 47 C.F.R. §74.1281. Those records must be maintained for at least two years, must be available for inspection, and may be kept at the primary FM station. Id.

10. At any time after August 29, 2001, the Bureau could have inspected the range of translator records required to be maintained by the rules. It seems that the Bureau now seeks to inspect translator records through discovery at a significant cost and inconvenience to PCI. Furthermore, there has not been an adequate showing of cause to require PCI to copy and produce its universe of maintenance records.

11. However, while there is not a need shown for a comprehensive production of all maintenance records, the Bureau is entitled to receive transactional documents for the time frame requested that will show how compliance with the translator rules is maintained and monitored, and that will also show the identity of the day to day persons responsible for the operation of the FM translators during the relevant time period as defined by the Bureau's Request for Documents. The same scaled-down selection of documents that relate to full power AM and FM station operations must also be produced.¹

Business and Financial Records Claimed to be Confidential

12. Document Request Nos. 2-11 ask for: All documents identifying the persons responsible for the financial operations of PCI alone including those responsible for receiving and processing payments to and from PCI, and all documents for all PCI stations in the following categories: advertising; budget and operating expenses; property insurance; federal income tax returns; P&L Statements for each station; loans, liens for security and loan instruments; telephone and utility bills.

13. PCI argues that there is no discovery relevance for these business documents that it considers to be confidential. PCI also charges the Bureau with harassment in seeking non-relevant records. The Bureau argues that the documents are relevant to showing profits and competitive advantages of PCI translator stations that are being illegally operated which is evidence that shows motive and intent.

¹ PCI has made admissions of its continued operations after the Commission cessation order and the court injunction. Therefore, counsel for the Bureau and counsel for PCI are to attempt to negotiate the scope of maintenance documents needed to supplement those admissions and report to the Presiding Judge by **June 24, 2002**.

14. There is relevance for motive in determining profitability and competitive strategies of alleged illegal operations. But there is no need shown to prove profitability beyond what could be determined by certified year end financial reports² such as P&L statements, and federal tax returns with schedules. That information is not privileged and must be disclosed to Bureau counsel.³ Alternatively, profits could be the subject of a stipulation with the Bureau given access to corroborating documents to support stipulated amounts. However, detailed operating expenses as narrow as phone and utility bills do not appear necessary to show motive and intent. In addition, to require such day to day costs would be unreasonably burdensome to PCI.

Advertising Income

15. It is also relevant for the Bureau to discover PCI's annual income that was received from advertising fees earned through the allegedly illegally operated translator stations. To accurately calculate, analyze and assess the significance of advertising income attributable to the translator stations, the entirety of PCI's advertising income during the relevant period can be requested. Therefore, all the documents requested for advertising are relevant and they must be produced.⁴

Documents and Records on File with the Commission

16. Document Request No. 12 asks for: All documents relating to any FCC application filed by, or license granted to PCI alone other than those related to the captioned stations. As licensee, PCI should be able to readily ascertain its universe of filings with the Commission. The request is limited to filings other than those for the stations listed in the caption of the case. The information in Commission filings relate to operations of licensed facilities, or facilities for which licenses are sought, and the documents requested are relevant under the Commission's broad meaning of relevance.

² Preferably, the financial reports would have an independent auditor's certification. However, PCI may be able to at least show reliable unaudited financials that were prepared in the course of its business.

³ If financial and/or tax data is recent and shown to be commercially sensitive so as to justify protection from competitors, a protective order would be considered for use at the hearing. Presently, the information is for discovery and should not be made public at this time.

⁴ There does not appear to be a similar need for discovery records of expenses related to advertising income beyond what is disclosed in P&L Statements and/or tax returns. The Bureau need not conduct an audit. However, PCI must produce documents that are reliable to show annual profits and/or losses related to advertising revenues from all sources.

17. See 47 C.F.R. §1.311(b) and §1.325(a). The burden of production is minimal, the documents are relevant, and therefore PCI should produce the requested documents in this category as soon as possible.⁵

Ownership and Corporate Records

18. Document Request No. 13 asks for: All documents related to the ownership interests in PCI by its shareholders, directors, officers, or others who may or did exercise ownership interests over PCI and/or its assets. True and accurate ownership is a relevant fact-finding for a corporate licensee. PCI claims that it has produced responsive documents and that it has no further documents that are responsive. But the Bureau asserts that it received only five responsive documents. What the Bureau now seeks are filings made under the State of Alaska Corporation Code that list stock holders, and also relevant schedules of federal tax returns that reflect stockholders. The Bureau is entitled to all such information and PCI must produce the documents or explain why the information is not available in the forms requested by the Bureau.

19. Document Request No. 14 asks for: All documents which list the former and current shareholders, directors, officers or others who may or did exercise management control of PCI. This request is substantially duplicative of Request No. 13. PCI need only provide a reliable list of present and former directors, officers and management control persons and course of business records that reflect such individuals and their dates of service during the relevant time frame. Also, all assignments subsequent to initial stock issuances should be accounted for by corporate documents and/or business records of PCI.

20. Document Request No. 15 asks for: Corporate minutes and related documents of PCI (alone) since December 4, 1990, which is the date of a Commission Report and Order concerning translator stations. PCI responded that it has no such documents. The Bureau is not satisfied that there could be no responsive corporate minutes and refers to Alaskan corporate law requiring minutes. The Bureau is entitled to a re-look by PCI and an explanation if in fact there are no minutes to produce because in fact none exist.

21. Document Request No. 17⁶ asks for: All documents relating to PCI's determination of the appropriate price for the FM translator stations identified in its 1996 contract with Coastal Broadcast Communications, Inc. ("Coastal"). PCI responded that no such documents exist. Under the circumstances, PCI should make further effort to be sure that there are no responsive documents that might have been missed or overlooked.

⁵ The fact that PCI sought the same documents from the Bureau is irrelevant. It is reasonable for Commission staff to assume that copies of Commission filings that are maintained by PCI and/or its agents are readily available and can be furnished to the Bureau quickly and completely. The same considerations of business practices would not be true of any similar request made of the Enforcement Bureau.

⁶ There was no assertion in the Bureau's Motion concerning Request No. 16.

The Bureau asserts that on November 14, 1996, PCI filed applications to assign nine translator licenses to Coastal to which were attached copies of an Asset Purchase Agreement. Those documents lend credence to the existence of other transactional documents and correspondence that are responsive to the Bureau's request.

Production Date

22. The documents required for production under this ruling must be **hand-delivered** to the Bureau by **June 26, 2002**, unless the parties agree otherwise.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION⁷



Richard L. Sippel
Chief Administrative Law Judge

⁷ Courtesy copies of this Order were faxed or e-mailed to Bureau counsel and to counsel for PCI on the date of issuance.
