A I want to make sure I understand what you mean by intervenor

JUDGE SIPPEL: Ask him to explain it to you.

THE WITNESS: Okay.

BY MR. SOUTHMAYD:

Q Are you the Plaintiff?

A No.

Q I mean, the Appellant?

A We are a party keeping informed. I'm sorry, I can't tell you exactly what our legal position is on that

Q Well, Mr. Bookey, let me ask you this. Are you the party that is complaining about the action of the Federal Communications Commission?

A What action?

Q That's the subject of the appeal?

A Correct.

Q Let me restate that. The Appellant is normally the party appealing an FCC decision. Are you the Appellant?

A Which decision in the Appeals Court are we talking about? I apologize for getting confused here, Your Honor.

Q No. I'm sorry --

JUDGE SIPPEL: Do you have a document you could put in front of him?

BY MR. SOUTHMAYD:

Q May I ask this, Your Honor? Mr. Bookey, are you a

1 party to more than one proceeding in the United States Court
2 of Appeals for the District of Columbia Circuit?
3 A Not to my knowledge. Only one.
4 Q Okay. What does that proceeding involve, to the
5 extent you know?
6 A Mr. Becker's translators.
7 Q Okay. What is your understanding of what position
8 you are taking in that Appellate case?
9 A Support of the FCC's position.
10 Q Which is what?
11 A That the translator licenses have been revoked and
12 that the translators were to cease operation.
13 Q So your position in the proceeding is to support
14 the continued discontinuation of operation of Mr. Becker's
15 translators. Is that your understanding?
16 A Yes.
17 Q You're against his company. Is that an accurate
18 statement?
19 A No, I look at it as I am in support of the FCC
20 action.
21 Q Is there a reason you didn't make this known in
22 your testimony?
23 A No.
24 Q I see.
25 JUDGE SIPPEL: His deposition testimony? Which

1 testimony?

2 MR. SOUTHMAYD: His testimony in this case.

3 JUDGE SIPPEL: I see what you mean.

4 BY MR. SOUTHMAYD:

5 Q But it's your understanding that in your Court of

6 Appeals case, you're an adverse party to Peninsula. *is* that

7 a fair statement?

8 A I don't know that I could make that a fair

9 statement.

10 Q Well, are you on their side or the FCC side?

11 A As I stated, I am on the FCC side.

12 MR. SOUTHMAYD: I see, thank you. I don't have

13 anything further, Your Honor.

14 JUDGE SIPPEL: Any redirect?

15 MR. SHOOK: Your Honor, we have no redirect.

16 JUDGE SIPPEL: You are excused as a witness, Mr.

17 Bookey. Thank you very much. Okay. Are *you* ready for **your**

18 next witness?

19 MS. LANCASTER: Yes, sir.

20 JUDGE SIPPEL: Let's go off the record while you

21 locate the witness.

22 (Whereupon, a short recess was taken.)

23 JUDGE SIPPEL: Okay. Ms. Lancaster, Mr. Shook, do

24 you have your next witness?

25 MS. LANCASTER: **Yes,** sir. We have Mr. Andrew

1 Tierney on the stand.

2 JUDGE SIPPEL: Would you raise your right hand,

3 please, and I will administer the oath?

4 MR. TIERNEY: Sure.

5 Whereupon,

6 ANDREW TIERNEY

7 having been duly sworn, was called as a witness

8 and was examined and testified as follows:

9 JUDGE SIPPEL: Please be seated. State your name

10 and your current address, please?

11 THE WITNESS: My name is Andrew Tierney. I reside

12 at: 3426 Bruce Lane in Anchorage, Alaska. Do you need a ZIP

13 code, too?

14 JUDGE SIPPEL: No. That is fine. You may

15 proceed, Ms. Lancaster.

16 MS. LANCASTER: Thank you. Your Honor, I've had

17 EB Exhibit 34 marked. It is the testimony of Mr. Tierney.

18 He has a copy of it in front of him. Copies were

19 distributed to Your Honor and to Mr. Southmayd with the

20 direct case. I'm going to give two copies to the Court

21 Reporter.

22 JUDGE SIPPEL: Thank you. The Court Reporter will

23 mark the document for identification as EB Number 34.

24 (The document referred to was

25 marked for identification as

1 Enforcement Bureau's Exhibit
2 34.)
3 DIRECT EXAMINATION
4 BY MS. LANCASTER:
5 Q Mr. Tierney, do you recognize what I just handed
6 you?
7 A I do.
8 Q Can you identify it for the record, please?
9 A Yes. This is my signed and sworn testimony as it
10 pertains to this case.
11 Q Have you reviewed that testimony?
12 A Yes, I have.
13 Q Is it true and accurate, to the best of your
14 knowledge?
15 A It is.
16 MS. LANCASTER: I hereby tender the witness, Your
17 Honor. I'm sorry, I'd like to offer Exhibit 34 into
18 evidence, Your Honor.
19 JUDGE SIPPEL: All right. Voir dire, objections,
20 Mr. Southmayd?
21 MR. SOUTHMAYD: Yes, Your Honor. If I could for a
22 minute.
23 VOIR DIRE EXAMINATION
24 BY MR. SOUTHMAYD:
25 Q Good afternoon, Mr. Tierney.

1 A Hello.

2 Q Are you a relative of Tom Tierney, the former

3 owner of Cobb Communications, Inc.?

4 A Yes, I am.

5 Q What's your relationship to Mr. Tom Tierney?

6 A I am his son.

7 Q I see. Did you work for your father for a time?

8 A I did.

9 Q What stations were those at? Or were they radio

10 stations, excuse me?

11 A They were radio stations.

12 Q What stations were they, Mr. Tierney?

13 A They were KVOK and KRXX.

14 Q Where are they located, sir?

15 A Kodiak, Alaska.

16 Q Are these the stations that are currently owned by

17 Mr. Bookey's company, Kodiak Broadcasting Company?

18 A If that's the name of Dennis's company, then the

19 answer is yes.

20 Q Did you, in fact, work for Mr. Bookey for a time?

21 A No. I did not.

22 Q Did Mr. Bookey acquire these stations from your

23 father?

24 A Yes, he did.

25 Q Then, at that point, you ceased employment?

1 A That is correct.
2 Q I see. Where are you currently employed?
3 A I am employed with a company called At Contact.
4 Q Where are they located?
5 A In Anchorage. Their corporate headquarters are in
6 Sedery, Colorado and they have an office in Anchorage.
7 Q What do you do there?
8 A We do some -- it's a hybrid of television and
9 satellite in the Alaska market.
10 Q I'm not sure I understand what that means?
11 A Well, we do some television. We have an Anchorage
12 station. We also have a station in Juneau, Sitka and
13 Ketchikan that we run out of the Anchorage office. The
14 satellite side is we are working with some rural communities
15 with some two-way satellite transmission.
16 Q Do you provide television programming?
17 A We do.
18 Q I see. So how long has it been since you've been
19 in the radio business in Kodiak?
20 A Well, the -- since 2000. It would be the spring
21 of 2000
22 Q How long were you in the radio business in Kodiak?
23 A Approximately four and a half years.
24 MR. SOUTHMAYD: Okay. Thank you.
25 Your Honor, I'd like to object on Page 3 of Mr.

Tierney's testimony, Paragraph 8, to: Peninsula's illegal broadcast.

JUDGE SIPPEL: We will do the same thing as we did before, allegedly --

MS. LANCASTER: Allegedly unauthorized broadcast.

JUDGE SIPPEL: -- unauthorized broadcast.

MR. SOUTHMAYD: Other than that, Your Honor, I don't have any objections at this point.

JUDGE SIPPEL: Okay. Do you want to move this into evidence at this time?

MS. LANCASTER: Yes, sir.

JUDGE SIPPEL: I am going to receive into evidence at this time EB Exhibit 34 for identification is now in evidence as EB Number 34, the testimony of Mr. Andrew Tierney. And do you want to tender the witness now for cross?

(The document referred to, previously marked for identification as Enforcement Bureau's Exhibit 34, was received in evidence.)

MS. LANCASTER: Yes, sir.

JUDGE SIPPEL: Okay. Your witness, Mr. Southmayd.

MR. SOUTHMAYD: Thank you.

CROSS-EXAMINATION

1 BY MR. SOUTHMAYD:

2 Q Mr. Tierney, I'd like to ask you: When did you

3 first become familiar with Peninsula Communications, Inc.,

4 Mr. Becker's company?

5 A I do not recall the exact date.

6 Q Well, are you aware that in 1992, your father

7 attempted to purchase certain stations in Soldotna, Alaska

8 from a Sally Blakely, doing business as King Communications?

9 A Excuse me, Your Honor, was there a question there?

10 Q I said, are you aware?

11 A No. I am not aware.

12 Q Were you working for your father in 1992?

13 A No. I was in college.

14 Q Well, has your father ever discussed with you the

15 fact that he attempted to purchase KAZL-FM in Soldotna,

16 Alaska and KSLD-AM in Soldotna, Alaska from Sally Blakely?

17 MS. LANCASTER: Your Honor, I object. That would

18 call for a hearsay answer.

19 JUDGE SIPPEL: Well, I am allowing it. It is

20 cross-examination. It is leading into a subject area.

21 Let's see.

22 THE WITNESS: No. I'm not aware.

23 BY MR. SOUTHMAYD:

24 Q So, is it your testimony, then, you had absolutely

25 no knowledge of this transaction until I mentioned it today?

1 A That is my testimony.

2 Q Mr. Tierney, how did you come to be here today as

3 a witness, and I don't mean mode of transportation? I mean,

4 what were the circumstances?

5 A I was contacted by Ms. Lancaster, roughly one

6 month ago, three weeks ago, as to information pertaining to

7 this case. She then asked me if I would testify

8 Q And you agreed to do so?

9 A I did.

10 Q Mr. Tierney. when you were employed at your

11 father's Kodiak stations, WOK-AM and KRXX-FM, if that's

12 correct?

13 A It is

14 Q Were there any other competitive commercial radio

15 stations operating in Kodiak Island?

16 A Besides KVOK and KRXX?

17 Q Correct.

18 A I guess the term radio station -- David Becker's

19 translators were turned on when I arrived in Kodiak in 1996.

20 I'm not sure if I answered your question.

21 Q No, that does. So there was no other competition

22 for your father's stations until Mr. Becker's translators

23 came on the air?

24 A With respect to radio stations?

25 Q Yes

1 A Correct.

2 Q Well, that was the first radio competition he had

3 on Kodiak Island?

4 A Correct.

5 Q Were you aware of a time when Mr. Becker's

6 translators ceased operation on Kodiak Island?

7 A I was aware of it.

8 Q Approximately when was that?

9 A I do not recall the exact date.

10 Q Do you know an approximate year?

11 A 1998 is an approximate year.

12 Q While you were employed at your father's company?

13 A That is correct.

14 Q Your duties were, you were the general managers of

15 the stations in 1998?

16 A Correct.

17 Q Did you supervise and oversee the sales operation

18 of the station?

19 A I did.

20 Q Following the termination of operation by Mr.

21 Becker's translators, did you change your advertising rates,

22 your advertiser's pay in any way?

23 A No. We did not.

24 Q So, during the period that Mr. Becker's

25 translators were not operating, did you make any change in

1 your rates during that entire period?

2 A I do not recall.

3 Q Do you think if you had raised or lowered the

4 rates, you would recall it at this point?

5 A If I had raised or lowered the rates, the rate

6 card would -- I was there for four-and-a-half years. The

7 rate card would fluctuate from time to time but, as to

8 specifics, I cannot recall.

9 Q While you were employed at your father's station,

10 was there an on-air personality named Danno working at the

11 station?

12 A Yes. There was.

13 Q Did he periodically, to your knowledge, listening

14 to your own radio station, go on the air and suggest that

15 people blow up Mr. Becker's transmitting equipment on Kodiak

16 Mountain?

17 A To my knowledge, that never happened.

18 Q Would it be safe to say that had it happened, it

19 would be without your knowledge and approval, then?

20 A Absolutely.

21 Q Can you tell me, what was the format of KVOK while

22 you were working at the station?

23 A There were two different formats.

24 Q Okay.

25 A When I arrived, KVOK was an oldie's format. And

it then became a mainstream-country format and that is what it was upon my departure.

Q When did it change, do you know?

A It changed in roughly late 19 -- specific, I'm not sure, but 1998, early 1999.

Q And the KRXX-FM, what format was that?

A That also started as classic rock.

Q Okay.

A It became roughly about the same time, became a rock AC.

Q Now, Mr. Becker, did he operate two translators on Kodiak?

A To my knowledge.

Q Yes. What formats did his translators operate at the time they went off the air in 1998?

A I believe KPEN was a country format and KWAV was a soft-AC format.

Q So is it fair to say that you changed KVOK from oldie's to country, or is it true, rather, when Mr. Becker's country translator went off the air; and you changed KRXX-FM from rock to rock AC, following Mr. Becker's other translator going off the ais and abandoning his AC format?

A Could you restate the question?

Q Yes. Did you make these format changes at or after the time Mr. Becker's translators stopped operating

1 with the same formats?

2 A I do not recall exactly when we changed them,

3 changed those formats.

4 Q Well, you recall that Mr. Becker's translators

5 went off in 1998?

6 A Roughly 1998.

7 Q Before these format changes took place in 1998,

8 was there a correlation. Do you recall?

9 A I do not recall it. The change made on the AM and

10 the FM clearly were made as a gauge of the current stations

11 in the market. And so as -- since Mr. Becker's stations

12 were no longer there, we clearly looked at broadening the

13 formats of the radio stations.

14 Q So would it be fair to say that, while Mr.

15 Becker's translators were on the air, there was a greater

16 diversity in programming format and radio in Kodiak. But

17 once they ceased operation, your two stations changed format

18 into those that had been abandoned by Mr. Becker?

19 A If you're asking if there was a diversity in

20 programming versus diversity in music, there was a diversity

21 in music previously, yes.

22 Q Mr. Tierney, there's testimony in your statement

23 concerning McDonald's advertising on Page 2?

24 A Mm-hmm.

25 Q Now, in your job as general manager, you had

1 expertise in selling to agencies and selling advertising to
2 McDonald's franchises. Is that an accurate statement?
3 A I did. Those did fall under my basic umbrella of
4 duties.
5 Q Was McDonald's your account?
6 A Yes. It was.
7 Q Okay. Does the McDonald's in Kodiak belong to the
8 -- well, first of all, is there a McDonald's co-op that buys
9 advertising in Alaska?
10 A There is.
11 Q Was the Kodiak McDonald's part of that co-op?
12 A It was not.
13 Q So, as I understand it and if you would correct me
14 if this is inaccurate, in the situation of a McDonald's co-
15 op in Alaska, the co-op buys advertising for all the
16 franchises. Is that correct?
17 A All the participating franchises, correct.
18 Q So, in the event that the Kodiak McDonald's was
19 not a member of the franchise, when they bought advertising
20 for those co-ops, it would not include advertising carried
21 in Kodiak. Is that correct?
22 A Who is they? I'm sorry.
23 Q The co-op? When the co-op made a buy for
24 McDonald's advertising throughout the state, it would not
25 include the Kodiak market because the Kodiak McDonald's was

1 not a member of the co-op. Is that correct?

2 A Their intention of placement was not Kodiak.

3 Q So the Kodiak McDonald's was on its own to

4 purchase advertising. Is that how that would work?

5 A That is correct.

6 Q Did it actually, while you were working for the

7 station, purchase advertising from your station?

8 A The Kodiak McDonald's did.

9 Q Did the Peninsula translators carry any -- during

10 this period you were there -- McDonald's advertising?

11 A Yes. They did.

12 Q Do you know whether that was the co-op purchase

13 for advertising, or whether that was the Kodiak McDonald's

14 purchase?

15 A It was the co-op purchasing.

16 Q Do you know which stations?

17 A I do not know.

18 Q Are you familiar with the fact that, at some

19 point, Peninsula lost the use of the tower site on which its

20 FM-translator's antennas hung?

21 A I am aware.

22 Q What's your understanding of what the

23 circumstances were under which that happened?

24 A Could you please refer to --

25 Q Under which it lost the use of that site? How did

1 that come about, if you know?
2 A My understanding of the White Allis (phonetic)
3 antenna site was that it was a militarily-based decision to
4 disassemble the old military antenna site.
5 Q When it was disassembled, Peninsula lost the use
6 of it. Would that be correct?
7 A Correct.
8 Q What role, if any, did Cobb Communications have in
9 the disassembling of that antenna site?
10 A To my knowledge, zero.
11 Q Does that mean you weren't personally involved?
12 A That means that I was not involved, nor anyone
13 associated, to my knowledge of Cobb Communications, was
14 involved.
15 Q Would that include your father?
16 A It would.
17 Q Mr. Tierney, are you familiar with the fact that
18 in 1995, FM-translator licensees in Alaska submitted
19 applications in the Federal Communications Commission to
20 renew their licenses?
21 A As to the specific recollection, no.
22 Q Do you know, to the best of your knowledge, did
23 Cobb communications file any petitions with the Federal
24 Communications Commission seeking the Commission's denial of
25 the Peninsula license renewal application?

1 A If it was done in 1995, I was not working for the
2 company in 1995.
3 Q Do you know, of your personal knowledge, whether
4 Cobb Communications, Inc. has filed any petition in
5 opposition to any application by Peninsula Communications,
6 Inc. involving its FM-translator stations?
7 A Is the question am I aware?
8 Q Yes?
9 A Yes. I am.
10 Q That Cobb has filed such a petition?
11 A Yes.
12 Q Were you directly involved in the filing of those
13 petitions or were you asked to have input into the process?
14 A The specific petitions, I'm not sure. Clearly, as
15 manager of the stations, I was relied upon to provide
16 information. But, as to the specific petitions, I cannot
17 recall.
18 Q Do you recall who you provided information to?
19 A Clearly, my father was one individual.
20 Q Did you deal with legal counsel on the preparation
21 of the petition?
22 A Yes. We did.
23 Q If you know, the upswing of the petition was that
24 you wanted these translators Mr. Becker owned in Kodiak
25 terminated. Is that correct?

1 A Again, I was not in on the specifics of the
2 petition.
3 Q What's your understanding?
4 A My understanding of the petition was simply to
5 bring the Kodiak translators in compliance with federal law.
6 I don't think our -- my understanding was there was no other
7 intention.
8 Q So are you saying there were no competitive
9 reasons for you to want these translators off the air?
10 A Are you speaking to the petition specifically?
11 Q Yes?
12 A Again, I did not craft nor was I in on the
13 petition, the petitions themselves.
14 Q Well, didn't you say you supplied some information
15 to your father of some sort?
16 A Correct.
17 Q I guess my question is: In your mind, from your
18 perspective, to the extent you participated, was one of the
19 issues in filing these petitions to end the competition that
20 Mr. Becker provided to your father's station?
21 MS. LANCASTER: Your Honor, I'm going to object.
22 This has been asked and answered several times. The witness
23 has already said he has no personal knowledge. He was
24 simply asked to provide some station information to his
25 father and to a lawyer, but he didn't participate in any of

1 the decisions regarding any petitions and he has no personal
2 knowledge about the motivations behind them.
3 MR. SOUTHMAYD: He says he has an understanding of
4 the petitions and that's what I'm trying to get to.
5 MS. LANCASTER: I believe he said he knew that
6 there was one.
7 JUDGE SIPPEL: Well, the witness seems to be
8 handling himself okay. It is cross-examination. I am going
9 to let it go. Do you have much more to go on this?
10 MR. SOUTHMAYD: No, Your Honor.
11 JUDGE SIPPEL: All right. I am taking, I am
12 listening very carefully to your objections and I am going
13 to have it in mind as we go forward with this. But for the
14 time being, I am going to overrule it and let Mr. Southmayd
15 finish up here.
16 BY MR. SOUTHMAYD:
17 Q Do you recall the question?
18 A I do not.
19 JUDGE SIPPEL: Can you rephrase it?
20 MR. SOUTHMAYD: I would have to rephrase it, Your
21 Honor. I don't recall it either.
22 JUDGE SIPPEL: All right.
23 BY MR. SOUTHMAYD:
24 Q Is it your understanding, Mr. Tierney, that the
25 petition filed by your company, your father's company,

against Mr. Becker's license-renewal application, had a competitive basis?

A Again, I can't speak to the petition itself.

Q What was your understanding, though, if you had one?

MS. LANCASTER: Again, Your Honor --

JUDGE SIPPEL: Wait, wait. Let the witness answer.

THE WITNESS: If you'd like to restate the question. Again, I cannot -- I've never seen nor did I participate in the crafting of this petition.

BY MR. SOUTHMAYD:

Q Well, let me get this straight, Mr. Tierney. You were the general manager of these radio stations in Kodiak, Alaska, in charge of their operation, and your company filed a petition with the FCC against the license-renewal applications for your only competitor in the radio business in Kodiak Island and you had no idea what was in the petition. Is that your testimony?

A Again, I have not seen the petition nor did I file the petition.

Q So you had no idea what was in the petition? You were completely ignorant of what the petition said?

A I'm not -- yes, I've never seen the petition. I don't know how else to answer it.

1 JUDGE SIPPEL: The probability is that he talked
2 about things, subject matter that was in the petition, but
3 he has never had any hands-on connection with the petition.
4 He is answering your question truthfully, straight on in
5 terms of -- but he is answering it narrowly. So I do not
6 know how much more you need to know from this witness.
7 Did you have a general understanding as to what
8 was intended to go into this petition, in terms of a general
9 sense?
10 THE WITNESS: In a general sense, non-
11 specifically, yes.
12 JUDGE SIPPEL: In a general sense in terms of the
13 subject matter, it obviously was going to focus on the
14 translators with the idea in mind of supporting the FCC, at
15 a minimum, supporting the FCC. Perhaps a little bit more in
16 terms of -- well, I won't say eliminating from competition,
17 but this would be another way of meeting the competition, in
18 a sense? Well, you say it your way.
19 THE WITNESS: I was going to agree with you until
20 the last part there, Your Honor.
21 JUDGE SIPPEL: All right.
22 THE WITNESS: Of course, I had a general
23 understanding of the issues.
24 BY MR. SOUTHMAYD:
25 Q Ah hah, and what was that general understanding?

1 A My general understanding of the issues is that it
2 does not pertain to a petition, because again, I have never
3 seen nor did I craft the petition, was that it was, there
4 was some alleged illegality that at least one broadcaster in
5 Alaska was willing to contest.
6 Q Mr. Tierney, were you involved in the transaction
7 in which these stations were sold to Mr. Bookey's company?
8 A To what degree are you referring?
9 Q To what degree were you involved, if at all?
10 A I was a manager for -- of course, I was involved.
11 I was the manager of the stations.
12 Q I see. Was the transaction contingent upon the
13 termination of the operation of Mr. Becker's translators on
14 Kodiak Island?
15 A Could you please restate that?
16 Q Yes. Was part of the consideration in the
17 transaction that you were involved in that Mr. Becker's
18 translators had cease? operation; and, therefore, that was a
19 consideration in your discussions with the buyer for their
20 interest in purchasing the station?
21 A Are you referring to the actual legal transaction
22 paperwork?
23 Q No. I'm referring to the negotiations and
24 discussions leading up to the sale of the station?
25 A Can you please restate the question? I don't mean

1 to -- I just kind of lose track.

2 Q Were you involved in any of the negotiations and

3 discussions leading up to the execution of a -- Was there a

4 contract executed for the sale of your stations to Mr.

5 Bookey?

6 A I have not -- I never saw a contract, if one

7 existed.

8 Q Do you believe one existed?

9 A One would -- you know, one would assume. But,

10 again, I've never seen one.

11 Q Were you involved in any negotiations on behalf of

12 Cobb Communications in connection with the sale of the

13 stations to Mr. Bookey?

14 A I did not have the authority to negotiate

15 Q I didn't ask you if you had the authority to

16 negotiate, Mr. Tierney. I asked if you were involved in the

17 negotiations at all?

18 A I was contacted by the buyers to basically share

19 some hands-on information about the radio stations.

20 Q And the radio market?

21 A Correct.

22 Q Did they want to know what the deal was with Mr.

23 Becker's translators in any of your discussions?

24 A Yes.

25 Q So, therefore, wouldn't it be fair to assume it

was a factor in the negotiation?

MS. LANCASTER: Your Honor, I'm going to object. He's --

JUDGE SIPPEL: Yes. I will sustain.

MS. LANCASTER: Thank you.

BY MR. SOUTHMAYD:

Q Was their interest in buying your stations premised in some regard on the fact that Mr. Becker's stations were not on the air?

MS. LANCASTER: Again, Your Honor, I'm going to object. He's already said --

JUDGE SIPPEL: I am going to sustain that. You can ask him if he has any knowledge to that effect.

BY MR. SOUTHMAYD:

Q Do you have any knowledge as to whether Mr. Becker's translators were a factor in their interest in purchasing your father's stations?

A If the question is: Do I have any knowledge directly?

JUDGE SIPPEL: No. Indirectly would be fine.

THE WITNESS: I could answer the question based on an assumption.

JUDGE SIPPEL: No, no, no. We do not do assumptions here.

THE WITNESS: Then, unfortunately, I think the two

1 parties that made that decision are the only two that know.
2 BY MR. SOUTHMAYD:
3 Q So you weren't involved?
4 A In the direct negotiations? No. I was not.
5 JUDGE SIPPEL: The question was: Did you have any
6 knowledge? Did you have any knowledge of these factors that
7 Mr. Southmayd just laid out for you, during the course of
8 the negotiation or in connection with the negotiation?
9 MS. LANCASTER: Your Honor --
10 JUDGE SIPPEL: And your question was, you mean
11 direct or indirect? And I said indirect will do. And then
12 we never really got an answer to the question.
13 MS. LANCASTER: Your Honor, may I?
14 JUDGE SIPPEL: Yes, ma'am?
15 MS. LANCASTER: I renew my objection because I
16 believe this witness has stated repeatedly that he was not
17 involved in the negotiations of any contract for the sale of
18 the stations. That he provided some hands on -- he answered
19 some questions or provided some information about the
20 operation of the station itself, but he did not negotiate
21 this contract.
22 You can ask him, but I don't think he was even in
23 the same location where they were negotiating the contract.
24 He just doesn't know, and to ask him the same thing five
25 times or ten times doesn't give him the knowledge to answer

1 the questions.

2 MR. SOUTHMAYD: Your Honor, it would be one thing

3 if he answered the question. I don't feel I'm getting them,

4 but the sale and acquisition of a broadcast station is more

5 than the negotiation of the contract. Before the parties

6 ever get to the contract, there are discussions, preliminary

7 discussions --

8 MS. LANCASTER: Your Honor, I'm going to object to

9 Mr. Southmayd testifying as to what goes into the sale of a

10 station.

11 JUDGE SIPPEL: Now, wait a minute.

12 MR. SOUTHMAYD: I'm just trying to figure out what

13 role it was in the process.

14 JUDGE SIPPEL: Look, you have got the floor, Mr.

15 Southmayd. Ask the questions. Ask the questions.

16 BY MR. SOUTHMAYD:

17 Q Let me try it another way. Mr. Tierney, Mr.

18 Bookey testified in his written testimony in this proceeding

19 that, and I quote: "When Kodiak Broadcasting purchased KVOK-

20 AM and KRXX-FM, it knew it was possible, but thought it

21 improbable, that Peninsula might resume its unauthorized

22 broadcasts into the Kodiak area Peninsula's competition in

23 the Kodiak market lowers the market value and sales price Of

24 WOK-AM and KRXX-FM."

25 Based on your knowledge, is that testimony

accurate and correct?

A Yes.

Q So, then, would you say that whether or not Mr. Becker's translators were on the air was a factor in the sales price that your father received for his stations from Mr. Bookey?

MS. LANCASTER: Objection, Your Honor.

JUDGE SIPPEL: Wait. What is the basis for your objection?

MS. LANCASTER: He's asking him to make an assumption based on that statement. He's already stated he didn't participate in the negotiations of the contract.

JUDGE SIPPEL: Ms. Lancaster, this witness has testified that he did make some input. He has got knowledge. He is there. All right. He is at the scene. I do not care whether you want to call him a negotiator, or an assistant to a negotiator, or an associate negotiator. He is at the scene. Let Mr. Southmayd ask his questions.

Now you have a question pending. Does the witness know what it is? I am overruling the objection.

BY MR. SOUTHMAYD:

Q Would you agree that whether or not Mr. Becker's translators were on the air would have an effect on the market value of the sales price that your father received for his stations from Mr. Bookey?

A Did it or could it? Well, Your Honor --

JUDGE SIPPEL: No. This is what this dialogue gets us to. You are not quite sure where you are at now. Try it again, Mr. Southmayd.

BY MR. SOUTHMAYD:

Q Mr. Tierney, as an experienced broadcaster in the Kodiak Island, Alaska radio market, is that a fair characterization of you as a broadcaster?

A Probably a stretch, but I thank you. Sure.

Q Is it fair to say that Mr. Becker's operation of his translators on Kodiak Island had the effect on the value of your father's station of lowering the value to a potential purchaser?

JUDGE SIPPEL: Are you asking for his opinion?

MR. SOUTHMAYD: Yes, based on his opinion as an experienced broadcaster on Kodiak Island?

THE WITNESS: As to the purchase price and value of the stations, I dc not know.

MR. SOUTHMAYD: Thank you. I don't have anything else for this witness, Your Honor.

JUDGE SIPPEL: Any redirect?

MS. LANCASTER: I have a couple of questions, Your Honor.

REDIRECT EXAMINATION

BY MS. LANCASTER:

1 Q Mr. Tierney, do you recall Mr. Southmayd asking
2 you about whether there were any other stations, or
3 basically any competition for advertising dollars on Kodiak
4 Island during the time that you were managers of the
5 stations there?
6 A I do remember.
7 Q I believe you stated that the only commercial
8 radio stations that broadcast to the island were broadcast
9 by Peninsula via the translators. Is that correct?
10 A The only competitive commercial, right.
11 Q Right. Was there any other competition for
12 advertising funds on the island? Did you have a public
13 radio on the island, for example?
14 MR. SOUTHMAYD: Your Honor, I object. Talk about
15 leading the witness. You might as well give the call sign.
16 JUDGE SIPPEL: I will permit it. Go ahead.
17 MS. LANCASTER: I believe it's already in his
18 testimony, Your Honor, which has already been admitted.
19 JUDGE SIPPEL: Well, then we do not have to repeat
20 it, then, do we?
21 MS. LANCASTER: There's one follow up that I do.
22 I was just laying the groundwork for the follow up.
23 JUDGE SIPPEL: All right. Let's do the follow up,
24 then.
25 BY MS. LANCASTER:

1 Q Did the public radio station, for example,
2 mentioned in your direct testimony, did it compete with your
3 station in any way for advertising money?
4 A It did to an extent. Not nearly as much as the
5 daily newspaper did.
6 MS. LANCASTER: One second.
7 BY MS. LANCASTER:
8 Q Mr. Tierney, who is this Danno person that Mr
9 Southmayd asked you about?
10 A He was a -- during the greater part of my tenure
11 on the island, was our morning show DJ
12 Q I believe you stated you didn't know anything
13 about any comments that he would have made regarding blowing
14 up Mr. Becker's translators. Is that correct?
15 A That is correct.
16 Q Would you likely have heard about that had that
17 been said on the air?
18 A Undoubtedly.
19 Q Did you have contacts in the community?
20 A A lot.
21 Q In your experience, did they tell you what they
22 heard on your stations?
23 A They did.
24 Q I believe you also stated that the Kodiak
25 McDonald's did purchase ads on Cobb's stations. Is that

1 correct?

2 A They did.

3 Q When did they start purchasing advertising on Cobb

4 stations?

5 A I don't recall it specifically, but I do remember

6 it was clearly after the translators were turned off and

7 they could no longer, the residents no longer had access to

8 the Alaska co-op McDonald's ads.

9 Q Thank you.

10 MR. SOUTHMAYD: May I have a quick follow up, Your

11 Honor?

12 JUDGE SIPPEL: Wait just a second. Let's see if

13 she is --

14 MR. SOUTHMAYD: I'm sorry. I thought she was

15 done.

16 JUDGE SIPPEL: She is just checking with counsel.

17 BY MS. LANCASTER:

18 Q I just want to clarify one point. When you

19 arrived on Kodiak to start working in managing the stations

20 there, were Mr. Becker's Peninsula's translators already on

21 air at that time?

22 A Yes. They were.

23 MS. LANCASTER: I have no further questions.

24 JUDGE SIPPEL: Did you have something more, Mr.

25 Southrnayd?

1 MR. SOUTHMAYD: Yes, just quickly, Your Honor.

2 RE-CROSS-EXAMINATION

3 BY MR. SOUTHMAYD:

4 Q Mr. Tierney, in response to counsel's question,

5 were you suggesting that the McDonald in Kodiak did not buy

6 advertising on your station while the co-op advertising was

7 being carried on Mr. Becker's station?

8 A I'm suggesting that because that's what the owner

9 of the McDonald's had told me.

10 Q So they relied on that advertising to promote

11 their business, the Peninsula advertising?

12 A As far as radio was concerned, yes.

13 Q Isn't it true, Mr. Tierney, that during this

14 period, a Big Mac at the McDonald's in Kodiak cost a buck

15 more than a Big Mac anywhere else in Alaska?

16 MS. LANCASTER: Objection. Well --

17 JUDGE SIPPEL: What is the basis of the objection?

18 MS. LANCASTER: I don't know that he would know

19 that, Your Honor.

20 JUDGE SIPPEL: Maybe if we let him answer the

21 question, we will find out.

22 MS. LANCASTER: I am going to withdraw it, Your

23 Honor, sorry.

24 JUDGE SIPPEL: Okay. We will consider it

25 withdrawn. I am sorry, Mr. Tierney.

THE WITNESS: The question is: Is the price of a Big Mac different in Kodiak than everywhere else in Alaska? That is not true.

BY MR. SOUTHMAYD:

Q So, when McDonald's ran co-op ads that were carried on the Peninsula station, giving prices for McDonald's products, they were the same prices that the Kodiak McDonald's was charging?

A I believe the Peninsula McDonald's prices were different than Kodiak.

Q Well, higher or lower?

A Lower.

Q So the Kodiak prices were higher?

A Correct.

Q So then how could the Kodiak McDonald's rely on the co-op advertising when the prices for the products being advertised were lower than the prices they were charging?

A I believe that's a question probably better suited for the owner of McDonald's.

MR. SOUTHMAYD: I see, thank you.

JUDGE SIPPEL: Does that conclude it?

MR. SOUTHMAYD: Yes, sir.

JUDGE SIPPEL: Anything more, Ms. Lancaster?

MS. LANCASTER: No, sir.

JUDGE SIPPEL: You are excused as a witness, Mr.

Tierney.

THE WITNESS: Thank you, sir.

JUDGE SIPPEL: Thank you.

Does that conclude your case?

MR. SHOOK: It does, Your Honor.

JUDGE SIPPEL: Anything more from Mr. Southmayd? Nothing except the admission submission on the 16th. Right?

MR. SOUTHMAYD: Yes, sir. I do have a question if I could, Your Honor. I understand Your Honor's previous order concerning the supplemental exhibits to be filed by Peninsula in the admission session. Does Your Honor contemplate allowing any other rebuttal exhibits, based on direct testimony given during this hearing phase?

JUDGE SIPPEL: I had not anticipated any. Nobody has raised it with me.

MR. SOUTHMAYD: Can I raise it with you, sir, since we're going to have a rebuttal session.

JUDGE SIPPEL: Well, as I said, I characterized it that way in a very broad context.

MR. SOUTHMAYD: I'm sorry.

JUDGE SIPPEL: It is technically not rebuttal. But go ahead, go ahead.

MR. SOUTHMAYD: If the Court would consider allowing rebuttal exhibits to be submitted and considered at that same session?

1 JUDGE SIPPEL: What would be the nature of the
2 rebuttal exhibits? Correspondence, filing documents?
3 MR. SOUTHMAYD: Yes, newspaper ads.
4 JUDGE SIPPEL: No newspapers come in here, no, no,
5 no, no.
6 MR. SOUTHMAYD: I don't know if I have an
7 exhaustive list in mind, other than there is testimony that
8 I think perhaps we would like to produce some documentation
9 in rebuttal of.
10 MR. SHOOK: Your Honor?
11 JUDGE SIPPEL: It is a little too vague. Go
12 ahead.
13 MR. SOUTHMAYD: Well, for example, the record
14 consists of one form of Kenai ratings information and
15 there's considerable testimony that the other, Eastland, has
16 considerably different ratings information. One thought
17 would be to submit a rebuttal exhibit with that.
18 JUDGE SIPPEL: On the point of --
19 MR. SOUTHMAYD: That it's not significantly
20 different, that the ratings are quite similar, to rebut the
21 testimony that there's some huge differential.
22 JUDGE SIPPEL: I would have to see what the
23 proposed exhibit was. If the proposed exhibit did nothing
24 more than talk about what the Kenai Peninsula situation
25 looked like, as opposed to the Kenai, Soldotna market, which

1 is what had been testified about, it would seem to me to be
2 redundant to what is in here with respect to Arbitron and
3 doesn't address what I suspect is Mr. Southmayd's concern.
4 Secondarily, we have got a problem with any
5 rebuttal showing to the extent that it might force or
6 require us to bring witnesses back from Alaska. Well, it
7 would be a short turn around. You are going to have your
8 exchange of the supplementals on October 7 with the Bureau
9 responding by the 11th. I certainly do not want to invite
10 rebuttal testimony.
11 No. What you are telling me here is not
12 convincing enough and I think you have not quite figured out
13 what you want to do with it yet.
14 MR. SOUTHMAYD: That's a fair statement, Your
15 Honor.
16 JUDGE SIPPEL: If you really had some hard reason
17 for rebuttal at this point, that would be a different
18 situation. But I am not going to invite counsel to go back
19 to your office and conjure up some good rebuttal stuff,
20 because the issues just do not seem to call for that.
21 You do have a very good point. If there are
22 documents that got in from the Bureau's side that are not
23 complete documents, absolutely. You have a right to bring
24 in, to get the full picture on those documents. But this is
25 too speculative.

1 So, if that is in the form of a motion, I am
2 denying it right here from the bench.
3 MR. SOUTHMAYD: Can I ask you, Your Honor, if upon
4 further reflection, I should come up with a need for a
5 rebuttal exhibit, would you consider a motion to accept it,
6 or does your decision here preclude that?
7 JUDGE SIPPEL: You can always file a motion. It
8 is going to have to be soon and it is going to have to be
9 with notice to the Bureau and you are going to have to give
10 them a chance to respond to it.
11 MR. SOUTHMAYD: Yes, sir. Thank you, Your Honor.
12 JUDGE SIPPEL: Well, what are we talking about for
13 a date here? Today's date is the 26th, right? You would
14 have to have it in by next Wednesday. And the Bureau can --
15 could you respond by the 9th? These have to be discrete. I
16 do not want to see, Mr. Southmayd, do you hear what I am
17 saying? This would have to be a very discrete motion, not
18 some effort to try and reopen your case.
19 MR. SOUTHMAYD: Peninsula's counsel firmly
20 believes that discretion is the -- I can't remember the
21 quote.
22 JUDGE SIPPEL: Better part of valor?
23 MR. SOUTHMAYD: Better part of valor, yes, sir
24 JUDGE SIPPEL: That is one line. There might be
25 some other lines, too, but we will go with that one.

1 MR. SOUTHMAYD: Thank you, sir.

2 JUDGE SIPPEL: Does that give you enough time, Mr.
3 Shook?

4 MR. SHOOK: Well, Your Honor, it's conceivable
5 that it's enough time, depending on what it is that Mr.
6 Southmayd submits to us.

7 JUDGE SIPPEL: Well, I am saying he is supposed to
8 be discrete. If he is not discrete, you just have to ask
9 for some more time

10 MR. SHOOK: Well, either that, or that would be an
11 omnibus objection interposed.

12 JUDGE SIPPEL: Yes.

13 MR. SHOOK: Because we had, what was it, months to
14 do discovery. We did a certain amount of discovery and
15 Peninsula did a certain amount of discovery. We took
16 depositions; Peninsula did not.

17 If what we're talking about here is trying to come
18 up with information to address testimony that has been
19 supplied by our four witnesses, I would object to that
20 strenuously and probably not even attempt to come up with a
21 substantive opposition, because this is something that
22 should have been addressed during discovery.

23 MR. SOUTHMAYD: Well, Your Honor, not all of these
24 witnesses had their depositions taken. In fact, I think the
25 majority or half the deponents weren't witnesses that are

here.

I'm suggesting that rebuttal evidence to testimony generally, testimony pursuant to cross-examination that was not in direct testimony; and that we had no knowledge of until we asked the questions and got the answers.

JUDGE SIPPEL: Well, you know --

MR. SHOOK: Your Honor, if you think about that for a second, the reason for that is that he didn't look.

MR. SOUTHMAYD: We didn't know who these people were until they showed up here in the hearing room. Where are we going to look?

JUDGE SIPPEL: Well, he is talking about, you did not seek to take depositions.

MR. SHOOK: As far as these individuals are concerned, in the case of Mr. Davis, for example, his deposition was noticed. Mr. Southmayd, for whatever reason, chose not to attend.

With respect to the other individuals, they are involved with companies that have been or are licensees of the affected stations. These individuals are not suddenly just appearing out of nowhere.

JUDGE SIPPEL: Well, I do not see, except for Mr. Davis, I recall that situation. His deposition was noticed and you elected not to participate in it. You could have done it even by telephone, if you wanted to, I guess.

1 So, as far as Mr. Davis is concerned, I would say
2 you are estopped from seeking any rebuttal on that, because
3 you knew what he was going to come in with. On the other
4 three, if you get your motion in by the 2nd; and whatever
5 the Bureau wants to do in terms of filing, I am going to be
6 hearing a case in St. Louis that following week, so I cannot
7 look at anything until the 15th anyway.
8 MR. SHOOK: Well, Your Honor, along these lines, I
9 would bring to your attention that having witnesses come
10 back from Alaska is essentially out of the question.
11 JUDGE SIPPEL: Did I say anything about witnesses
12 coming back? He wants to file a motion asking for rebuttal
13 of evidence in the form of written documents. We have not
14 gotten at all into -- that would be a serious factor that I
15 would take into consideration. He has got a very heavy
16 burden. That would be one of the factors in terms of that
17 burden. I am not going to bring somebody back in here from
18 Alaska. I do not want to say under any circumstances, but
19 it is going to be a very, very difficult -- that would be an
20 unusually difficult burden to meet.
21 As it is, he has a burden to meet. He has got the
22 burden of persuasion on this. You are absolutely right.
23 You can do something, or you can do nothing and still not
24 prejudice, perhaps, your position. I would be delighted to
25 read and consider anything that you had on it, and I might

1 not be able to get to it until the 16th. I might just rule
2 on the record then, because my schedule is just too tight.
3 But you come in with something on the 2nd, which
4 is a Wednesday, and be sure you get a fax to me, and I will
5 be able to take a look at it before I get back.
6 MR. SOUTHMAYD: Thank you, Your Honor.
7 JUDGE SIPPEL: All right? Again, I am putting
8 that out as a warning. It better be discrete and I am sure
9 you understand what I am talking about.
10 MR. SOUTHMAYD: Yes, sir.
11 JUDGE SIPPEL: There better be a darn good reason
12 for it. Okay.
13 MR. SHOOK: Your Honor, just one more point along
14 these lines. If the rebuttal that Mr. Southmayd has in mind
15 involves Mr. Becker's testimony to address anything that has
16 occurred, or Mrs. Becker, or their employees, first of all,
17 we have Mr. Becker here and I have a very difficult time
18 understanding that there could be any waiting involved
19 before such a reappearance took place. It should be now.
20 JUDGE SIPPEL: You mean in terms of Mr. Becker
21 testifying in rebuttal?
22 MR. SHOOK: If that's what is going to happen.
23 JUDGE SIPPEL: I got the impression it was going
24 to be more on the documentary side?
25 MR. SOUTHMAYD: Correct.

JUDGE SIPPEL: Did you want to put Mr. Becker on?

MR. SOUTHMAYD: No. I don't anticipate any rebuttal evidence coming from Mr. Becker.

MR. SHOOK: Or any live witness?

MR. SOUTHMAYD: I don't know that. Don't ask me. I'm sorry, I can't answer. You know what I mean.

JUDGE SIPPEL: You heard me on the live witnesses?

MR. SOUTHMAYD: Yes, sir. I mean, I assume documentation. For example -- well, maybe I shouldn't give an example.

JUDGE SIPPEL: You do not have to give an example.

MR. SOUTHMAYD: Yes, sir.

JUDGE SIPPEL: Give the examples in your motion.

MR. SOUTHMAYD: Yes, sir.

JUDGE SIPPEL: And any documents that you want to attach to it. No more than ten pages on the motion, though. But you can give me proposed exhibits to look at.

MR. SOUTHMAYD: Thank you, Your Honor.

JUDGE SIPPEL: Okay. That is by four o'clock, I better have those by four o'clock on Wednesday, the 2nd. I am going to ask that leading question again: Does that conclude everything today?

MR. SHOOK: Well, and then you had mentioned a reply time?

JUDGE SIPPEL: Well, I said the 9th. But I am not

1 going to be here on the 9th to look at it, so I would give
2 you certainly until the 11th, which is Friday. I am trying
3 to be as open with you as I possibly can. There is no sense
4 in having you come in with something I cannot read. But if
5 it is in my office on the 11th, and the 14th is a holiday.
6 I will be back in on the 15th and I can start looking at it.
7 Okay?
8 MR. SOUTHMAYD: Thank you.
9 JUDGE SIPPEL: Technically, we are in recess until
10 the 16th of October at 9 a.m. here in this courtroom. Thank
11 you very much.
12 MR. SHOOK: Thank you, sir.
13 JUDGE SIPPEL: We are off the record.
14 (Whereupon, at 4:00 p.m., the hearing in the
15 above-entitled matter was adjourned until October 16, 2002
16 at 9:00 a.m.)
17 //
18 //
19 //
20 //
21 //
22 //
23 //
24 //
25 //

REPORTER' S CERTIFICATE

FCC DOCKET NO.: EB-No. 02-21

CASE TITLE: Peninsula Communications

HEARING DATE: 9/26/02

LOCATION: Washington, D C

I hereby certify that the proceedings and evidence are contained fully ana accurately on the tapes and notes reported by me at the nearing in the above case before the Federal Communications Commission.

Date: 9/9

Edna Thomas
Official Reporter
Heritage Reporting Corporation
1220 "L" Street, N.W.
Washington, D.C. 20005

TFANSCRIBER'S CERTIFICATE

I hereby certify that the proceedings and evidence were fully an2 accurately transcribed from the tapes and notes provided by the above named reporter in the above case before the Federal Communications Commission.

Date: 9/9

Official Transcriber
Heritage Reporting Corporation

PROOFREADER'S CERTIFICATE

I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission *was* proofread on the date specified below.

Date: 10/9

Official Proofreader
Heritage Reporting Corporation