

DOCKET FILE COPY ORIGINAL RECEIVED

Before the  
Federal Communications Commission  
Washington, D.C. 20554

DEC 24 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	EB Docket No. 02-21
	)	
<b>Peninsula Communications, Inc.</b>	)	
	)	File No. EB 01-M-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
WEN-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, <b>Homer</b> , Alaska; and	)	
K274AB and K285AA, Kodiak, Alaska	)	

To: Chief Administrative Law Judge  
Richard L. Sippel

**ENFORCEMENT BUREAU'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Respectfully submitted,  
David H. Solomon  
Chief, Enforcement Bureau

Charles W. Kelley  
Chief, Investigations and Hearings Division

James W. Shook  
Attorney

Judy Lancaster  
Attorney

No. of Copies rec'd 076  
List A B C D E

December 24, 2002

## Table of Contents

Topic	Page #
Summary	iii
I. Preliminary Statement	1
II. Proposed Findings of Fact	3
A. Overview	3
B. Background	5
C. PCI Begins to Build Translator Network	6
D. The Translator Rules Change	10
E. PCI Continues to Build Translators	12
F. Competitive Impact of PCI's Translators	15
G. PCI's 1995 Renewal Applications	18
H. The Assignment Applications	22
I. PCI's 1997 Renewal Applications	26
J. PCI Ordered to Sell or Risk Loss of the Translators	31
K. PCI Is Ordered Off the Air and Ignores Commission Order	34
III. Proposed Conclusions of Law	39
A. PCI's Operation of Translators Post August 29,2001	39
B. PCI's Character Qualifications	43
IV. Ultimate Conclusions	44

## Summary

On May 18, 2001, the Commission released a *Memorandum Opinion und Order* (“*Order*”) that directed Peninsula Communications, Inc. (“PCI”) to terminate operation of seven translators. PCI did not do so. Although PCI filed an appeal with Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) to overturn the Commission’s Order, PCI never received a stay of the Commission’s *Order* from the Commission or the D.C. Circuit.

On August 29, 2001, the Commission released a *Notice of Apparent Liability for Forfeiture and Order* (“*NAL&Order*”), which, *inter alia*, notified PCI that further operation of the seven translators might raise serious questions about PCI’s qualifications to be a Commission licensee and might result in proceedings that could lead to the revocation of one or more of PCI’s licenses. PCI responded to the *NAL&Order* by declaring that it had operated the translators and would continue to do so until such time as the D.C. Circuit rules on its appeal.

Finally, on February 6, 2002, the Commission released the *Order to Show Cause* (“*OSC*”) that commenced this proceeding. Among other things, the Commission noted the possibility that the D.C. Circuit could ultimately reinstate the licenses of the seven translators. The Commission stated that even if the translator licenses were reinstated, PCI’s conduct – operation of the seven translators following receipt of the *Order* to shut down – raised questions as to whether PCI should be entitled to continue as licensee. PCI received the OSC and, notwithstanding that it knew it was deliberately violating a Commission order as long as it continued to operate the translators, PCI continued to operate the seven translators for more than six months after release of the *OSC*. Worse,

PCI, by its president, David Becker, testified in this proceeding that PCI would still be operating the translators but for a preliminary injunction against operation issued by the United States District Court in Alaska (“Alaska District Court”).

Revocation of all of PCI’s licenses is warranted. The Communications Act makes clear that, while operative, Commission orders must be obeyed. PCI did not obey a direct Commission *Order* to terminate operations on seven translators for a period of 15 months. PCI disobeyed that *Order* intentionally and with a complete understanding as to the possible sanctions its conduct invited. PCI must now face the consequences.

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

In the Matter of	)	EB Docket No. 02-21
	)	
<b>Peninsula Communications, Inc.</b>	)	
	)	File No. EB 01-I <del>EE</del> 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
	)	
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	)	

To: Chief Administrative Law Judge  
Richard L. Sippel

**ENFORCEMENT BUREAU'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. PRELIMINARY STATEMENT**

1. By *Order to Show Cause*, 17 FCC Rcd 2838 (2002) (“*OSC*”), the Commission commenced this proceeding to determine whether the licenses held by Peninsula Communications, Inc. (“*PCI*”) should be revoked
2. In paragraph 6 of the *OSC*, the Commission specified the following issues for

resolution in this proceeding:

- (a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF [sic], Kenai; K283AB Kenai/Soldotna; K257DB Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Znc.*, 16 FCC Rcd 11364 (2001), and related violation of Section 416(c) of the Act;
- (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. has the requisite character qualifications to be a Commission licensee and thus whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked.

3. Paragraph 9 of the OSC placed the burden of the introduction of evidence and the burden of proof on the Commission.

4. By *Order*, FCC 02M-42, released May 24, 2002, the presiding Administrative Law Judge ("ALJ") gave PCI the opportunity to file a Motion for Leave to Offer Proof with respect to a state of mind defense. By *Order*, FCC 02M-69, released July 19, 2002, the ALJ granted PCI's Motion for Leave to Offer Proof With Respect to State of Mind.

5. The ALJ held a hearing on the issues in Washington, D.C. from September 24 through 26, 2002.<sup>1</sup> After a supplementary admissions session on October 16, 2002, the ALJ closed the record in this proceeding on October 18, 2002, except for EB Ex. 23, which was

---

<sup>1</sup> In this document, we will refer to a Bureau exhibit as EB Ex. #, and an Official Notice exhibit as Off. Not. Ex. #. We will refer to a PCI exhibit as PCI Ex. #. We will cite hearing transcript pages as Tr. #. The following witnesses testified at the hearing in this matter: David Becker, Tr. 72-443; John Davis, Tr. 454-527; Cherie Brewer, Tr. 529-564; Dennis Bookey, Tr. 564-582; and Andrew Tiemey, Tr. 583-614. The deposition testimony of Eileen Becker, David Becker's wife, was received into evidence in lieu of her live testimony. EB Ex. 30, pp. 293-363; Tr. 450-51.

ultimately modified by stipulation to ameliorate confidentiality concerns. *See Order*, FCC 02M-97, released October 18,2002; Stipulation re Enforcement Bureau Exhibit 23.

## II. PROPOSED FINDINGS OF FACT

### A. OVERVIEW

6. On May 18,2001, the Commission released a *Memorandum Opinion and Order and Order to Show Cause, Peninsula Communications, Inc.*, 16FCC Rcd 11364 (2001) (“*Termination Order*”), that, *inter alia*, ordered PCI to terminate operation of seven translators. PCI received the *Termination Order*, read it and understood it, but continued to operate the seven translators. Although PCI filed an appeal with Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) to overturn the *Termination Order*, PCI did not receive a stay of the *Termination Order* from the Commission or the D.C. Circuit.

7. On August 29, 2001, the Commission released a *Notice of Apparent Liability for Forfeiture and Order, Peninsula Communications, Inc.*, 16FCC Rcd 16124 (2001) (“*NAL&Order*”), which, *inter alia*, notified PCI that further operation of the seven translators might raise serious questions about PCI’s qualifications to be a Commission licensee and might result in proceedings that could lead to the revocation of one or more of PCI’s licenses. PCI received the *NAL&Order*, read it and understood it, but continued to operate the seven translators.

8. Finally, on February 6,2002, the Commission released the *OSC* that commenced this

proceeding. Among other things, the Commission noted the possibility that the D.C. Circuit could ultimately reinstate the licenses of the seven translators. The Commission stated that even if the translator licenses were reinstated, PCI's conduct – operation of the seven translators following receipt of the *Termination Order* – raised questions as to whether PCI should be entitled to continue as licensee. PCI received the *OSC*, read it and understood it, and recognized that it was deliberately violating a Commission order as long as it continued to operate the translators. Nevertheless, PCI continued to operate the seven translators for more than six months after release of the *OSC*. Worse, PCI, by its president, David Becker, boldly declared in this proceeding that it would still be operating the translators but for a preliminary injunction against operation issued by the United States District Court in Alaska (“Alaska District Court”).

9. The record demonstrates beyond doubt that loss of all of PCI's licenses is warranted. The Communications Act makes clear that, while operative, Commission orders must be obeyed. PCI did not obey the *Termination Order* for a period of 15 months. PCI disobeyed that order intentionally and with a complete understanding as to the possible sanctions its conduct invited. Thus, PCI must lose its licenses. Otherwise, the Commission will be inviting regulatees flagrantly to violate the law by ignoring unstayed, operative Commission orders with which they disagree in the hope that if such orders are overturned, no adverse consequences will ensue.

## B. BACKGROUND<sup>2</sup>

10. With two others, David and Eileen Becker formed PCI in 1978. PCI Ex. 1, p. 4. Since October 1982, the Beckers have been PCI's sole owners, each owning 50 percent. EB Ex. 30, p. 304; Tr. 91-93, 361-62. In September 1979, PCI began broadcasting on its first station, KGTL-FM. KGTL-FM (now KWVV-FM) became Homer's first commercial FM station, and is that community's only commercial FM station. PCI Ex. 1, p. 4. *See* 47 C.F.R. § 73.202.

11. Shortly before KGTL-FM commenced operations, KSRM, Inc., a broadcast licensee located in Kenai, Alaska, some 65 miles north of Homer, began translating its FM station, KQOK-FM, in Homer. Off. Not. Ex. 1, pp. 1-2; EB Ex. 31, p. 1. PCI responded by filing a petition with the Commission, which sought the termination of KSRM, Inc.'s translator.<sup>3</sup> PCI argued that then section 74.1232(d) of the Commission's rules prohibited the licensee of a commercial FM station from owning and operating an FM translator that provided service beyond the primary station's predicted 1 mV/m contour, if such service extended into the predicted 1 mV/m contour of another commercial FM station licensed to a different community.<sup>4</sup>

---

<sup>2</sup> To provide the overall context of this case, we set forth a detailed, chronological statement of the facts. The key facts are contained in section II K, *infra*.

<sup>3</sup> FM translators are low-power stations that receive the signals of a full-service FM station and simultaneously retransmit those signals on another frequency. The Commission first authorized FM translators in 1970 as a means to provide FM service to those unable to receive satisfactory service due to distance or terrain obstructions. FM translators have always been a secondary service intended to supplement, but not serve as a substitute for, full-service stations. *E.g.*, Off. Not. Ex. 2, p. 1. Thus, unlike full-service stations, translators have never had local service obligations. *See* Off. Not. Ex. 4, p. 9. Moreover, translators that cause interference are not permitted to continue operation. *Id.*, p. 19; 47 C.F.R. § 74.1203.

<sup>4</sup> *See* Off. Not. Ex. 4, p. 3 at ¶ 15.

In this case, the coverage contour of KSRM, Inc.'s translator extended beyond the 1 mV/m contour of KQOK-FM and was wholly within the 1 mV/m contour of KGTL-FM. EB Ex. 31, pp. 1-2.

12. By *Memorandum Opinion and Order* released January 11, 1982 (Off. Not. Ex. 1), the Commission denied PCI's petition.<sup>5</sup> The Commission acknowledged that the rules proscribed the licensing of an FM translator to a licensee of an FM station if the translator is in a community beyond the 1 mV/m contour of the FM station and extends into the 1 mV/m contour of an existing FM station. However, the Commission further observed that section 74.1232(h) of the rules permitted, but did not require, termination of the KSRM, Inc.'s translator. The Commission concluded that because PCI did not show that KGTL-FM faced imminent demise, the public interest favored maintenance of both commercial services, that is, KSRM, Inc.'s translator and KGTL-FM. *Id.*, p. 3 at ¶ 8. Following the Commission's ruling, KSRM, Inc. continued to operate its translator (K265AG) until June 1, 1994. EB Ex. 31, p. 2; Tr. 121,464, 507.

### **C. PCI BEGINS TO BUILD ITS TRANSLATOR NETWORK.**

13. Several months after the Commission's decision, PCI filed an application to build a new FM translator to carry KGTL-FM to the communities of Kenai and Soldotna. EB Ex. 6, pp. 33-58. PCI explicitly requested a waiver of section 74.1232(d) of the rules, contending that the Commission had previously recognized that Alaska suffered from inadequate communications

---

<sup>5</sup> *Peninsula Communications, Inc.*, 50 RR 2d 1135 (1982).

service and, consequently, had granted numerous waivers of television translator rules, citing *Wrangell Radio Group*.<sup>6</sup> PCI concluded that even though its waiver request concerned radio rather than television, a similar scarcity of radio signals in Alaska warranted similar relief. EB Ex. 6, pp. 41-42.

14. Following its initial review of the application, the FCC's staff sent PCI a letter which noted that the application proposed operation contrary to section 74.1232 of the rules. EB Ex. 29. PCI responded with an amendment, which, among other things, argued that because the Commission had recently denied PCI's effort to terminate KSRM, Inc.'s translator in Homer, PCI should be allowed to place a translator in Kenai/Soldotna to provide that area with a second FM service. PCI Ex. 6, pp. 8-9; Tr. 116. Ultimately, the Commission's staff granted PCI's application. PCI Ex. 6, p. 24; Off. Not. Ex. 8, p. 3.

15. PCI commenced operation of the Kenai/Soldotna translator in 1983. PCI Ex. 1, p. 5. *See also* PCI Ex. 6, p. 29; EB Ex. 6, pp. 13,17, 32. For the most part, the Kenai/Soldotna translator rebroadcast the programming of KGTL-FM (now KWVV-FM), Homer. PCI Ex. 6; EB Ex. 6, pp. 13,28, 30, 32; Tr. 144. During the entirety of the translator's operation, PCI's Homer FM station competed with KSRM, Inc.'s stations for advertising revenue and market share in the Kenai/Soldotna area. EB 31, pp. 2-3; Tr. 146.

16. In April 1986, PCI filed applications for three new translators to serve Homer as well as the nearby communities of Anchor Point/Seldovia and Kachemak City, all three of which already received service from PCI's KGTL-FM. EB Ex. 3, pp. 25-42; EB Ex. 5, pp. 24-42; EB

---

<sup>6</sup> 75 FCC 2d 404 (1980) ("*Wrangell*").

Ex. 8, pp. 19-36. PCI advised that the proposed translators would carry PCI's second commercial FM station, KPEN-FM, Soldotna, which had begun operations in 1984. PCI Ex. 1, p. 5; EB Ex. 3, pp. 25, 27; EB Ex. 5, pp. 24, 26; EB Ex. 8, pp. 19, 21; EB Ex. 31, pp. 2-3. In each of the applications, PCI explicitly sought a waiver of section 74.1232(d) of the Commission's rules. PCI explained that although each proposed translator's contour would extend beyond the contour of KPEN-FM and be within the contour of KGTL-FM, PCI did not object to the introduction of a second commercial FM signal into the market to be served by each translator as it would be the licensee of both. EB Ex. 3, p. 39; EB Ex. 5, p. 39; EB Ex. 8, p. 33. The Commission's staff granted licenses to PCI for the Homer and Kachemak City translators in 1986 and for the Anchor Point/Seldovia translator in 1987. EB Ex. 3, p. 19; EB Ex. 5, p. 18; EB Ex. 8, p. 18; Off. Not. Ex. 8, p. 3.

17. In the meantime, PCI expanded its programming reach to Kodiak, the principal community of Kodiak Island. PCI arranged to have the Kodiak Community Church ("KCC") carry KGTL-FM on the latter's translator, K285AA, which Commission staff ultimately licensed in February 1985. EB Ex. 9, p. 54. In 1988, PCI bought K285AA from KCC for \$100 and thereafter continued to carry KGTL-FM on that translator. EB Ex. 9, pp. 43-53. PCI also built a translator on Kodiak to carry its AM station, KGTL,<sup>7</sup> on FM channel 272. EB Ex. 4, pp. 76-97. After PCI built the three Homer area translators (**see** ¶ 16, *supra*), PCI changed the input station of the second Kodiak translator to WEN-FM. EB Ex. 4, pp. 62-75. Although Kodiak had

---

<sup>7</sup> PCI had commenced operations on station KGTL(AM) (formerly known as KCNL), Homer, several years earlier. **See, e.g.,** EB Ex. 6, p. 43.

service from a commercial **AM** station (KVOK) and a non-commercial station (KMXT(FM)), section 74.1232(d) of the Commission's rules as then written did not come into play as there was no other commercial FM station on Kodiak at the time PCI acquired or built its two Kodiak translators. Off. Not. Ex. 8, pp. 3-4; PCI Ex. 1, p. 5; Tr. 281-82.

18. Thus, by the close of the 1980s, PCI broadcast both KWVV-FM (formerly KGTL-FM), Homer, and WEN-FM, Soldotna, into three of the major communities of the Kenai Peninsula - Kenai, Soldotna and Homer - either from the stations' main antennas or via translators licensed to Kenai/Soldotna, Homer, Anchor Point and Kachemak City. EB Ex. 3, p. 17; EB Ex. 5, p. 16; EB Ex. 6, p. 30; EB Ex. 8, p. 16. In addition, PCI provided programming to the community of Kodiak on both KPEN-FM and KWVV-FM via translators. EB Ex. 4, p. 60; EB Ex. 9, p. 41. Following submission of postcard applications for renewal in 1988, PCI in 1989 received renewal grants for its existing translators for terms to end April 1, 1996. EB Ex. 3, pp. 16-18; EB Ex. 4, pp. 59-61; EB Ex. 5, pp. 15-17; EB Ex. 6, pp. 29-31; EB Ex. 8, pp. 15-17; EB Ex. 9, pp. 40-42. Like all Commission broadcast station licenses, PCI's translator licenses reflected that they were subject to the provisions of the Communications Act of 1934 (the "Act"), subsequent acts and treaties, and all regulations heretofore or hereafter made by the Commission. *E.g.*, EB Ex. 8, p. 18.

## D. THE TRANSLATOR RULES CHANGE

19. In December 1990, following issuance of a *Notice of Inquiry* (“*NOI*”)<sup>8</sup> and a *Notice of Proposed Rule Making* (“*NPRM*”),<sup>9</sup> the Commission released its translator *Report and Order* (“*R&O*”).<sup>10</sup> The *R&O* restructured the rules so that translators would fulfill their intended purpose as a secondary service, that is, to provide supplementary service to areas in which direct reception of radio broadcast stations was unsatisfactory. Off. Not. **Ex.** 4, p. 1. The *R&O* also amended the rules to ensure that FM radio broadcast stations were not adversely affected by translator operations. *Id.*, p. 2. Consequently, the new rules proscribed ownership of “other area” translators by primary station licensees.” *Id.*, p. 4. The *R&O* established a very strict waiver standard, noting that the Commission would be “favorably disposed to requests for waiver of the ownership rule only in “white area”<sup>12</sup> situations where service “is indeed unavailable.” *Id.*, p. 5. Likewise, the new rules prohibited primary station licensees from providing any financial support, either directly or indirectly, to the licensee of an “other area”

---

<sup>8</sup> *In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 3 FCC Rcd 3664 (1988). See also 53 FR 22035 (June 13, 1988).

<sup>9</sup> *In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 5 FCC Rcd 2106 (1990). See also 55 FR 13296 (April 10, 1990).

<sup>10</sup> *In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212 (1990). See also 55 FR 50690 (December 10, 1990).

<sup>11</sup> See 47 C.F.R. § 74.1201(d), (h) and (i) for definitions of primary station, fill in and other area translators, respectively.

<sup>12</sup> For purposes of the proceeding, the *R&O* defined “white area” as any area outside the coverage contour of any full-time aural service. Off. Not. **Ex.** 4, p. 5 at ¶ 23.

translator, either before or after commencement of operations. *Id.*, p. 6. The Commission designed the new restrictions on ownership and financial support both to protect existing full-power stations from competition from translators and to maximize service by full-power stations. The *R&O* explained: “While the establishment of independent party translators in these other locations [*i.e.*, other area translators] indicates a public desire for the programming, translators owned by FM radio broadcast stations would more likely indicate a station’s interest in reaching audiences in areas that lie outside its service area. More generally, we believe that to relax restrictions on FM radio broadcast ownership of translators would conflict with our belief that the public interest is best served by maximizing service through the use of FM radio broadcast stations.” *Id.*, p. 4, ¶ 22.

20. With respect to the delivery of the primary station’s signal to a translator, the *R&O* allowed commercial translators providing fill-in service to use only terrestrial transmission facilities in order to obtain the primary station’s signal. Even in “white area” situations, the *R&O* provided that commercial translators, no matter whether owned independently or by the primary station licensee, would receive the primary station’s signal only by terrestrial means. The *R&O* retained the old signal delivery rule permitting satellite delivery only for non-commercial educational translators operating on a reserved channel, and owned and operated by the licensee of the primary station. *Id.*, pp. 9-10. In discussing the signal delivery rule, the *R&O* expressed the Commission’s intention to continue to accord “special treatment” to Alaska broadcasters. Specifically, the *R&O* stated: “We intend that our decisions herein not alter in any fashion the special treatment we accord Alaska. *Wrangell Radio Group*, 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." *Id.*, p. 34, n. 59.

21. So as not to unduly disrupt service provided by FM translators already in operation, the *R&O* allowed licensees a lengthy grace period of three years from the requirements of the new ownership and signal delivery rules, rather than a permanent exemption. *Id.*, p. 21. Finally, the *R&O* ordered that the then-existing freeze on applications for new commercial FM translators and major changes to existing translators would continue for 60 days after the effective date of the new rules. The *R&O* further ordered that, within 60 days thereafter, pending applications on file had to amend their applications to conform to the new rules. *Id.*, p. 22. The new rules ultimately became effective June 1, 1991.<sup>13</sup> *See Order*, 6 FCC Rcd 2334 (1991). PCI never submitted a request *to* waive revised section 74.1232(d) of the Commission's rules for any of its other area translators that were in operation before June 1, 1991. Tr. 119.

## **E. PCI CONTINUES TO BUILD TRANSLATORS**

22. In May 1991, less than one month before the new translator rules were to become effective, PCI filed applications to build three new FM translators. One proposed service to Kenai, the other two proposed service to Seward. EB Ex. 7, pp. 19-35; EB Ex. 28; Tr. 163,284.

---

<sup>13</sup> By *Memorandum Opinion and Order*, the Commission denied petitions for reconsideration of the *R&O*. *In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 8 FCC Rcd 5093 (1993) (Off. Not. Ex. 6). *See also* 58 FR 42020 (August 6, 1993).

In addition, PCI filed applications to effect major changes to existing translators that served Kodiak and Kenai/Soldotna. EB Ex. 4, pp. 47-58; EB Ex. 6, pp. 17-26; Tr. 166, 169. With each application, PCI submitted a cover letter that requested a waiver of the processing freeze in order to allow it to construct the requested facilities before the onset of winter. PCI cited the Commission's decision in *Wrangell* in support of its waiver requests. EB Ex. 4, pp. 48-49; EB 6, pp. 17-18; EB Ex. 7, pp. 19-20; EB Ex. 28 pp. 2, 21.

23. PCI's application for the new Kenai translator included an explicit request for a waiver of section 74.1235 of the rules, which governed power limitations. EB Ex. 7, p. 28; Tr. 164. The application also explained why a second translator was needed to serve Kenai, as PCI's existing translator licensed to Kenai and Soldotna provided a signal that was "far less favorable" to Kenai. EB 7, p. 29. Finally, in connection with an application question pertaining to section 74.1232 of the rules, PCI reported that it was the licensee of both the proposed translator and the primary station to be rebroadcast (KWVV-FM). *Id.*, pp. 27, 35. PCI's Kenai application contained no information relative to the existence of other full-time aural services in the area, and while it was pending, PCI did not file an amendment to reflect such information. *Id.*, *passim*. Even though PCI did not request a waiver of or demonstrate compliance with the revised section 74.1232(d) of the rules, the Commission's staff granted PCI a construction permit for the new Kenai translator on September 6, 1991, and a license on April 24, 1992. *Id.*, pp. 15, 18; Tr. 166-67.

24. As it did in the Kenai application, PCI also requested in its applications for the Seward translators a waiver of section 74.1235 of the rules. EB Ex. 28, pp. 19, 38. PCI also

informed that it proposed to deliver the signals of KPEN-FM and KWVV-FM to the translators via microwave or a satellite. *Id.*, pp. 11, 30; Tr. 287. Finally, as it did in the Kenai application, PCI related in the Seward applications that it was the licensee of both primary stations to be rebroadcast. EB 28, pp. 11, 30. *See also id.*, pp. 10, 18, 29, 37; Tr. 286. Although PCI noted in its applications that it sought to provide Seward's first commercial FM services, PCI did not submit any information relative to the presence of any full-time aural service in Seward, and it never amended its applications to do so.<sup>14</sup> Ex. 28, *passim*; Tr. 306. Even though PCI did not demonstrate compliance with revised section 74.1232(d) of the rules and did not request a waiver of that rule or of section 74.1231(b) of the Commission's rules, the Commission's staff granted PCI's applications and sent a letter dated February 18, 1992, explicitly waiving the ownership and signal delivery rules, citing *Wrangell*. The staff letter also informed PCI that with respect to the one rule for which PCI had specifically sought a waiver (section 74.1235 of the rules), none was necessary. Off. Not. **Ex. 5**; Tr. 306.

25. Like its applications for new translators in Kenai and Seward, PCI's major change applications for its Kodiak and Kenai/Soldotna translators did not **seek** a waiver of revised section 74.1232(d) of the rules. Tr. 167, 169. Rather, PCI merely related that it was the licensee of the proposed translator as well as the licensee of the station to be rebroadcast. EB Ex. 4, p. 56; EB Ex. 6, pp. 25, 28. In addition, while the Kodiak application noted the existence of other FM stations in the area, it did so only in the context of explaining why a frequency change of PCI's

---

<sup>14</sup> As acknowledged by PCI at the hearing, an **AM** station had provided service to Seward since the late 1970s. PCI Ex. 1, p. 6. *See also* Off. Not. Ex. 12, p. 3.

translator was necessary. EB Ex. 4, p. 57. Similarly, PCI's major change application for the Kenai/Soldotna translator never hinted at the existence of other full-time aural services in the Kenai/Soldotna area but merely explained that its proposed change of frequency would not cause interference to two Anchorage FM stations. EB Ex. 6, p. 26. PCI never amended either application to address the revised section 74.1232(d) of the rules as required by the *R&O*. Tr. 168; Off Not. Ex. 4, p. 22. Even though PCI did not request a waiver of or demonstrate compliance with the revised section 74.1232(d) of the rules, the Commission's staff granted PCI's major change applications on September 6, 1991. EB Ex. 4, p. 45; EB Ex. 6, p. 16. In 1992, the staff granted the respective license applications. EB Ex. 4, p. 42; EB Ex. 6, p. 13.

## **F. COMPETITIVE IMPACT OF PCI'S TRANSLATORS**

26. As noted at ¶ 12, *supra*, by June 1, 1994, KSRM, Inc. had shut down the translator it operated in Homer. According to John Davis, KSRM, Inc.'s president and majority shareholder, he personally turned off KSRM, Inc.'s translator and removed the equipment following advice from his attorney that a Commission directive (*i.e.*, the amended translator rules) required such action. Tr. 507. Mr. Davis testified that by so doing, KSRM, Inc. gave up the revenue it had been earning through the sale of advertising time in Homer. EB Ex. 31, pp. 2, 4. In addition, Mr. Davis testified that, in light of the changes in the rules, KSRM, Inc. scrapped plans to expand its stations' reach by declining to **seek** authority to build new other area translators. Tr. 506. PCI did not stop operating any of its translators. In Mr. Davis's view, KSRM, Inc. has been "punished" for complying with the new translator rules inasmuch as its principal competitor,

PCI, did not so comply. EB Ex. 31, p. 4. Mr. Becker knew that KSRM, Inc. stopped operating its translator but claims he did not know why. Tr. 122. Mr. Becker acknowledged that during its operation, KSRM, Inc.'s translator competed with PCI for advertising revenue in Homer and that its presence hurt PCI financially. Tr. 121-22.

27. Following construction of the Seward translators, PCI began to market its stations as area "super stations." The "super stations" concept allowed PCI to sell commercial time on KPEN-FM and KWVV-FM to advertising agencies in Anchorage, Seattle and other cities outside Alaska, which represented national clients such as McDonalds, Burger King, Midas, Chrysler, Ford and Chevrolet.<sup>15</sup> With one buy, the agency could reach the entire Kenai Peninsula, as well as Kodiak Island. EB Ex. 25; EB Ex. 31, p. 3; EB Ex. 32, p. 2; EB Ex. 33, pp. 3-4; EB Ex. 34, p. 2. Mr. Davis and Cherie Brewer, KSRM, Inc.'s general manager, both testified that businesses in Kenai and Soldotna would often purchase time on KWVV-FM and/or KPEN-FM, not because those stations had higher local ratings than KSRM, Inc.'s stations, but because PCI's stations reached potential customers via its translators that KSRM, Inc.'s full-service stations could not reach. EB Ex. 31, p. 3; EB Ex. 32, p. 2; *see also* EB Ex. 30, p. 325; Tr. 509, 514-15, 535-42.

28. Andrew Tierney, general manager of KVOK and KRXX(FM), Kodiak from January 1996 to April 2000, testified that in Kodiak, PCI's sale of advertising to the Alaska McDonalds Co-op precluded as a practical matter the sale of advertising to the Kodiak McDonalds by KVOK and KRXX(FM) even though the Kodiak McDonalds was not a member of the co-op. According

---

<sup>15</sup> Peninsula's Income Statement for the years 1999, 2000 and 2001 reflect that approximately 40 percent of its total income from commercials came from sales in Anchorage. EB Ex. 23A.

to Mr. Tierney, the Kodiak McDonalds did not purchase time on full-service KVOK and KRXX(FM) until PCI stopped broadcasting via translators in Kodiak. Essentially, the Kodiak McDonalds received “free” advertising because McDonalds advertising was being broadcast into Kodiak via PCI’s translators. EB Ex. 34, p. 2; Tr. 594-95. PCI’s translator broadcasts into Kodiak further reduced the local full-service licensee’s revenues because some advertisers split their advertising budgets between PCI’s stations and the local licensee’s stations in order to reach the island’s audience. However, when PCI stopped its translator operations on Kodiak in November 1997, advertising money from at least one advertiser went solely to KVOK and KRXX(FM). PCI Ex. 6, p. 13; PCI Ex. 9, p. 9; EB Ex. 34, p. 3. Conversely, Mr. Becker acknowledged that PCI lost advertising revenues when its Kodiak translators went off the air. Tr. 205.

29. Dennis Bookey, principal of the current licensee of KVOK and KRXX(FM), Kodiak Broadcasting Company, Inc., testified that PCI’s resumption of commercial broadcasts in Kodiak on its translators in January 2001 (*see* Off. Not. Ex. 13, p. 2, n. 4; Tr. 241) had an immediate and significant adverse effect on the business of Kodiak Broadcasting’s full-service stations. From just two accounts, Kodiak Broadcasting lost an estimated \$21,000 in annual revenues. EB Ex. 33, pp. 2-3; Tr. 569-71. Mr. Bookey’s estimates do not include national and regional revenue. EB 33, p. 2.

30. Although Mr. Becker testified that the Commission’s field staff has never cited PCI for violating the main studio rule with respect to its operation of KPEN-FM, he acknowledged that PCI does not currently schedule local programming at its the Kenai studio (which serves as

the “main” studio for both KPEN-FM and KXBA(FM), Nikiski, which PCI brought on line in the late 1990s). Tr. 115,323-24,374; EB Ex. 24. Mr. Becker further acknowledged that the only PCI staff at the Kenai studio are his sales manager and another salesman. Tr. 111. Mr. Davis, Ms. Brewer, Mr. Tierney and Mr. Bookey testified that by keeping its programming staff in Homer for virtually all of its programming and using the Kenai/Soldotna facilities almost exclusively as a sales office, PCI can keep its costs in Kenai, Soldotna, Kodiak and Seward lower than its full-power competitors, which maintain fully-staffed operations in their respective communities of license. EB Ex. 31, p. 4; EB Ex. 32, p. 3; EB Ex. 33, p. 4; EB Ex. 34, p. 4; Tr. 556-58. In turn, PCI’s lower costs and greater reach, both a direct result of its operation of other area translators, gave it a competitive advantage to which it was not entitled. EB Ex. 32, p. 3; EB Ex. 33, p. 4; EB Ex. 34, pp. 3-4.

31. KSRM, Inc. and the Kodiak licensees have a record of serving their local communities through live local programming, contributions of free air-time and/or prize and monetary donations to community causes, and/or providing local weather or emergency warnings. EB Ex. 32, pp. 4-5; EB Ex. 33, pp. 4-6; EB Ex. 34, pp. 4-7. PCI’s broadcasts, enhanced by the other area translators, siphoned off revenues that would have otherwise been available for the full-service broadcasters in Kenai/Soldotna and Kodiak. EB Ex. 32, pp. 2-3; EB Ex. 33, pp. 2-3; EB Ex. 34, pp. 3-4.

## **G. PCI’S 1995 RENEWAL APPLICATIONS**

32. With virtually identical cover letters dated November 22, 1995, PCI filed renewal

applications for its other area translators. EB Ex. 3, p. 8; EB Ex. 4, p. 36; EB Ex. 5, p. 8; EB Ex. 6, p. 8; EB Ex. 7, p. 8; EB Ex. 8, p. 8; EB Ex. 9, p. 33; Tr. 312-13. In each application, PCI responded “yes” to questions inquiring about PCI’s compliance with sections 74.1232(d) and (e) of the Commission’s rules. *E.g.*, EB 6, p. 11; Tr. 371-72. In support of its responses, PCI declared that, “[i]n approving the original construction permit and license for this translator, the Commission” granted PCI’s request for a waiver of the rule. Thus, according to PCI, it was “authorized by the Commission’s waiver of Sections 74.1232(d) and (e) to operate the translator in its present mode.” EB Ex. 3, pp. 12, 15; EB Ex. 4, pp. 40-41; EB Ex. 5, pp. 11, 14; EB Ex. 6, pp. 11-12; EB Ex. 7, pp. 11, 14; EB Ex. 8, pp. 11, 14; EB Ex. 9, pp. 36, 39; Tr. 312-13.

33. In early 1996, petitions to deny were filed against **six** of PCI’s renewal applications by four competitors located in the Kenai/Soldotna area, Kodiak and Seward (the “Alaska competitors,” one of which was Mr. Davis’s KSRM, Inc.). Each petition to deny alleged that PCI was violating section 74.1232(d) of the rules by operating other area translators that rebroadcast KPEN-FM or KWVV-FM beyond the station’s protected service contour. Off. Not. Ex. 8, pp. 1-2; Tr. 524. In addition, by letter dated March 4, 1996, the Commission’s staff informed PCI that review of its other area translator renewal applications indicated that PCI “may be in violation of the Commission’s revised ownership and support rules governing commercial FM translator stations.” Off. Not. **Ex.** 7, p. 1. The staff’s letter stated that the waivers previously received by PCI had been granted because of an understanding that the subject translators would be providing service to small, isolated communities in Alaska that would otherwise be deprived of any radio service and that no existing or potential full service stations would be affected.

Further, the staff's letter noted that a recent examination of PCI's station files indicated that the areas served may be well-populated and better served by full service local broadcast stations. Finally, the staff's letter declared that any waivers granted occurred before the new rules became fully effective. The staff's letter thus advised PCI that, if it wished to continue to own and operate the translators, it would have to submit a showing that the translators were providing fill-in service, service to "white areas," or needed service to small, isolated Alaskan communities otherwise deprived of aural broadcast services. *Id.,passim*. Mr. Becker received and read the letter and had PCI's counsel prepare a response. Tr. 169-70.

34. Following receipt of PCI's opposition to the petitions to deny (consolidated with its response to the staff's March 4, 1996, letter) and the Alaska competitors' consolidated reply, the Chief, Audio Services Division, by letter dated September 11, 1996, issued a preliminary ruling on the petitions to deny. Off. Not. **Ex. 8**. After reviewing the status of each of PCI's other area translators, the Chief gave PCI the benefit of the doubt regarding its operation of other area translators after June 1, 1994, concluding that, except for the Seward translators, PCI could have reasonably, but mistakenly, believed that the staff had implicitly waived section 74.1232(d) of the rules. *Id.*, pp. 6-7. With respect to the Seward translators, the Chief acknowledged that the staff had granted waivers of section 74.1232(d) of the rules in its February 18, 1992, letter. *Id.*, p. 7. However, after considering all the circumstances, the Chief determined that prospective waivers of that rule were not warranted for any of PCI's other area translators, including the two

in Seward," and that PCI had to divest itself of its ownership interests in those translators. *Id.*, p. 9. Accordingly, the Chief granted the petitions to deny in part, deferred action on PCI's renewal applications, and gave PCI 60 days to file applications to assign the licenses to unaffiliated parties. The Chief stated that if any such assignment applications were granted, the renewal applications would be granted conditioned upon consummation of the assignments. *Id.*, p. 10. The September 11, 1996, ruling did not discuss the waivers of section 74.1231(b) that the staff had granted PCI with respect to the Seward translators. *Id., passim.*

35. PCI did not seek reconsideration or review of the September 11, 1996, ruling. Tr. 170-71. However, the Alaska competitors filed an application for review, arguing that PCI should have been ordered off the air. In opposing the application for review, PCI declared, *inter alia*, that it intended to comply in all respects with the Chief's ruling. EB Ex. 10, p. 3; Tr. 173-74. Also, after observing that the ruling required PCI to come into compliance with section 74.1232(d) of the rules and that a prospective waiver was not warranted, PCI argued that the Chief's ruling was consistent with a recent ruling involving similar circumstances. EB Ex. 10, p. 5. PCI further acknowledged that the revised ownership rules required divestiture of non-compliant translators by June 1, 1994. *Id.*, p. 6. However, in responding to the Alaska competitors' arguments that the Chief's ruling erred by not ordering PCI off the air, PCI argued that section 74.1232 of the rules did not call for automatic expiration of the license of any non-

---

<sup>16</sup> In this regard, the Chief observed that, with respect to the Seward translators, section 74.1232(h) of the rules allowed termination of any waiver of section 74.1232(d) upon 60 days notice where the circumstances in the area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing. Off. Not. Ex. 8, p. 8.

compliant translator station and that section 1.62 of the rules allowed PCI to continue to operate the translators until the Commission made a final determination with respect to the renewal applications. *Id.*, pp. 6-7. PCI concluded that the Chief’s ruling was “fully consistent with applicable Commission rules, policy and precedent.” *Id.*, p. 7. Mr. Becker acknowledged that he probably reviewed the pleading before its filing. Tr. 173.

## **H. THE ASSIGNMENT APPLICATIONS**

36. Two weeks after opposing the Alaska competitors’ application for review, PCI filed applications to assign its nine other area translators to an entity called Coastal Broadcast Communications, Inc. (“Coastal”). *E.g.*, EB Ex. 11; Tr. 174-75. Coastal, like PCI, was a husband-wife company, whose principals were David and Judy Buchanan. Off. Not. Ex. 10, p. 3. Mr. Becker had known Mr. Buchanan for about 20 years. Mr. Buchanan had worked as a broadcast engineer at KCAM in Glennallen, Alaska. PCI Ex. 1, p. 8. Mr. Buchanan and his wife resided in Eagle River, a community located north of Anchorage, some 200 miles from Homer. EB Ex. 11, p. 5; Tr. 176.

37. With the assignment applications the parties filed copies of an Asset Purchase Agreement (“APA”), which had been prepared by PCI’s counsel. EB Ex. 11, pp. 10-43; Tr. 175-76. The APA proposed the sale of the nine translators for a cost of \$100,000. EB Ex. 11, p. 15. According to Mr. Becker, the parties determined the price by averaging the cost of the nine translators at roughly \$10,000 to \$15,000 apiece, notwithstanding that much of the equipment had been completely depreciated. Tr. 195-96; EB Ex. 23A; EB Ex. 30, p. 350. According to

Mrs. Becker, the parties wanted to come up with a “doable” figure, which allowed PCI to recover some value. However, she also acknowledged that the main value in the transaction for PCI was in keeping the translators operating. EB Ex. 30, p. 349.

38. Mr. Becker also related that, prior to the APA’s execution, he had shown Mr. Buchanan a survey as well as PCI’s client list and rate cards, which reflected PCI’s spot rates for commercial time at its various stations. Tr. 177-78. See *also, e.g.*, EB Ex. 24. Mr. Becker testified that Mr. Buchanan planned to produce commercials, which Coastal would then pay PCI to air on its two primary stations. Tr. 188-92; 363. According to Mr. Becker, Mr. Buchanan knew that the Seward translators received their feed via satellite and that the Kodiak translators’ antennas were subject to removal by the U.S. Air Force. Tr. 193-94.

39. The APA obliged Coastal to close only after a final Commission order, which the APA defined as one from which no appeal, application for review or petition for reconsideration could be taken. EB Ex. 11, pp. 12, 17-18. Also, the APA made as a condition precedent to the buyer’s obligation to close that there would be no governmental action pending, or which threatened, to revoke, refuse to renew, or modify to buyer’s detriment any of the authorizations. *Id.*, p. 18; Tr. 327. The APA provided that PCI finance the entire purchase price at 6 percent interest over a 20-year period. EB Ex. 11, pp. 15, 38. Finally, the APA provided that Coastal give PCI a security interest in the translators’ equipment. *Id.*, pp. 40-43.

40. By letter dated June 17, 1997, the Chief, Audio Services Division, dismissed the applications as patently defective. Off. Not. Ex. 9. Specifically, the Chief found fault with the APA’s seller-financing provisions, which she concluded were incompatible with section

74.1232(d) of the rules, which forbade grant to any person “having any interest whatsoever, or any connection with a primary FM station.” *Id.*, p. 2. See also 47 C.F.R. § 74.1232(e).<sup>17</sup> The Chief gave PCI and Coastal 10 days to refile their applications, which they did on July 1, 1997. *Id.*, p. 3; e.g., EB Ex. 12; Tr. 207. In so doing, PCI and Coastal modified the APA to delete the seller-financing provisions, the note and the security agreement. EB Ex. 12, pp. 9-10; Tr. 197. To finance the deal, Coastal sought and eventually received tentative approval for a Small Business Administration loan from the Bank of America. EB Ex. 16. The Alaska competitors who petitioned to deny PCI’s 1995 renewal applications also filed petitions to deny the assignment applications, arguing that the assignments could not be granted unless and until PCI’s renewal applications were granted and that the applicants’ certifications of compliance with section 74.1232(d) of the rules could not be trusted. Off. Not. Ex. 10, p. 3; Tr. 526.

41. In the meantime, Coastal had filed applications on June 16, 1997, to modify PCI’s Kodiak translator station licenses. Coastal’s applications sought a waiver of section 74.1231(b) of the rules. EB Ex. 4, pp. 8-35; EB Ex. 9, pp. 8-32; Tr. 200, 207. Coastal reported that PCI’s translators had lost their ability to receive KWVV-FM clearly and KPEN-FM at all due to the destruction of antennas PCI had leased from the U.S. Air Force. EB Ex. 4, p. 17; EB Ex. 9, p. 16; Tr. 203, 208. The applications argued that grant of the requested waivers would be consistent

---

<sup>17</sup> Interested and connected parties in both section 74.1232(d) and (e) extended to: “group owners, corporate parents, shareholders, officers, directors, employees, general and limited partners, family members and business associates.” The rules allowed an FM translator station only to “receive technical assistance from the primary station to the extent of installing or repairing equipment or making adjustments to equipment to assure compliance with the terms of the translator station’s construction permit and license.” 47 C.F.R. § 74.1232(e).

with the actions taken by the staff in granting the Seward translator construction permit applications. EB Ex. 4, pp. 18-19; EB Ex. 9, pp. 17-18. Mr. Becker claimed that his role in preparing the applications was “technical” and that he merely assisted Mr. Buchanan who put the application together even though Mr. Becker supplied virtually all of the material used in Coastal’s applications. Tr. 200-02.

42. Subsequently, by letters dated November 12, 1997, PCI reported that both Kodiak translators had gone silent. PCI Ex. 5, p. 13; PCI Ex. 8, p. 9. Prior to the translators going off the air, they operated for several weeks via satellite delivery of KWVV-FM and KPEN-FM. Mr. Becker understood and acknowledged that this use of satellite delivery was contrary to the stations’ licenses and the Commission’s rules. Tr. 205, 240-41; EB Ex. 30, pp. 350-51. The Kodiak translators remained silent until October 29, 1998, when they began to rebroadcast the programming of the Kodiak translator licensed to the Kodiak Community Church. Off. Not. Ex. 11, p. 7, n. 13. While PCI’s Kodiak translators were silent or rebroadcast programming other than KWVV-FM and KPEN-FM, the full power commercial stations licensed to Kodiak, KVOK and KRXX(FM), received advertising revenues that would have otherwise gone to PCI. EB Ex. 34, p. 3. Conversely, PCI lost advertising revenues. Tr. 205. **See also** EB Ex. 23A.

43. By letter dated November 6, 1997, the Chief, Audio Services Division, granted PCI’s 1995 renewal applications, as well as the applications filed by PCI and Coastal to assign the licenses for PCI’s nine other-area translators. Off. Not. Ex. 10. In so doing, the Chief denied the petitions to deny the assignment applications filed by the Alaska competitors, accepting Coastal’s representations that its principals were not related to the Beckers, that its principals had not had

prior business dealings with PCI, that the terms of the APA resulted from “arms-length” negotiations, and that Coastal would not accept any contributions from PCI. *Id.*, p. 3. Consistent with her September 11, 1996, letter, the Chief conditioned grant of the renewal applications on consummation of the proposed assignments. However, because of the recent filing of PCI’s 1997 renewal applications for the translators, which resulted from the Commission changing FM translator license terms, the November 6, 1997, letter also conditioned consummation of the assignments on the grant of PCI’s 1997 renewal applications. *Id.*, pp. 3-4. See *also* Off. Not. Ex. 11, p. 2, n. 2. The November 6, 1997, letter did not address Coastal’s applications to modify PCI’s Kodiak licenses. *Id.*, *passim*. Mr. Becker received and read the November 6, 1997, letter. Tr. 209.

44. Neither PCI nor Coastal sought Commission review of the November 6, 1997, letter. Once again, however, the Alaska competitors did, filing both an application for review and a petition for reconsideration in which they argued for revocation of PCI’s other area translator licenses. Off. Not. Ex. 11, p. 1, n. I and p. 4; Tr. **210**. In opposing the Alaska competitors’ arguments, PCI, as it had previously in defending the Chief’s September 11, 1996, letter, argued that the Chief’s actions were consistent with the law. EB Ex. 13, p. 2; Tr. 211.

## **I. PCI’S 1997 RENEWAL APPLICATIONS**

45. As indicated in ¶ 43, *supra*, PCI filed applications in September 1997 to renew its translator licenses at the same time it filed applications to renew its full-service authorizations. EB Ex. 3, pp. 1-7; EB Ex. 4, pp. 1-7; EB Ex. 5, pp. 1-7; EB Ex 6, pp. 1-7; EB EX. 7, pp. 1-7; EB

Ex. 8, pp. 1-7; EB Ex. 9, pp. 1-7. In its 1997 other area translator renewal applications, contrary to what it did in 1995, PCI now acknowledged that its ownership of the translators was inconsistent with section 74.1232(d) of the rules. EB Ex. 3, p. 5; EB Ex. 4, p. 5; EB Ex. 6, p. 5; EB Ex. 7, p. 5; EB Ex. 8, p. 5; EB Ex. 9, p. 5; Tr. 140, 145, 372. In the 1997 translator renewal applications, PCI explained that its pending assignment applications to Coastal, which proposed PCI's divestment of ownership, would bring PCI into compliance with the Commission's rules. *E.g.*, EB Ex. 3, p. 7. As had been the case with PCI's 1995 translator applications, the Alaska competitors filed petitions to deny against six of the 1997 renewal applications, namely, those for Kenai, Kenai/Soldotna, the two in Kodiak and the two in Seward. Off. Not. Ex. 11, p. 1.

46. By *Memorandum Opinion and Order*, FCC 98-314, released December 10, 1998,<sup>18</sup> the Commission disposed of virtually all extant matters concerning PCI.<sup>19</sup> Off. Not. Ex. 11. The Commission affirmed the determinations made by the Chief, Audio Services Division, with respect to PCI's 1995 renewal applications and the 1997 PCI/Coastal assignment applications. *Id.*, p. 6. In so doing, the Commission noted, among other things, that the Bureau's findings rendered PCI ineligible to continue to hold the other area translator licenses. *Id.*, p. 5. The Commission also granted PCI's 1997 renewal applications for its other area translators, conditioning them on consummation of the granted assignments, which would eliminate the violations of section 74.1232(d). *Id.*, pp. 8-9.

---

<sup>18</sup> *Peninsula Communications, Inc.*, 13 FCC Rcd 23992 (1998) ("*December 1998 MO&O*").

<sup>19</sup> The *December 1998 MO&O* did not address STA requests that PCI had filed in August 1998, which sought use of a satellite system to deliver the programming of KPEN-FM and KWVV-FM to its Kodiak translators. PCI Ex. 5, pp. 5-13; PCI Ex. 8, pp. 1-9. Off. Not. Ex. 11, *passim*.

47. However, the Commission denied Coastal's applications to modify the Kodiak translators, finding that waivers of section 74.1231(b) of the rules were not warranted because the translators did not propose service to "white areas." *Id.*, p. 7. In so doing, the Commission noted that it restricted waivers of sections 74.1231(b) and 74.1232(d) of the rules to "white areas" to promote incentives for full-service broadcasting and to prevent translators from unfairly competing with full-service stations. The Commission also addressed the intended meaning of footnote 59 of the *R&O*,<sup>20</sup> stating that, in context, the intention to accord special treatment to Alaska referred only to the Commission's willingness to allow an Alaskan commercial translator providing *fill-in* service to use satellite delivery upon a showing that no terrestrial means of delivery was available. *Id.*, n. 12 (emphasis in original).

48. With respect to PCI's 1997 renewal applications for the Seward translators, the Commission observed that initial grant of PCI's signal delivery waivers would not be appropriate in the absence of a "white area" showing, and it expressly disagreed with the staff's application of *Wrungell* in its February 18, 1992, letter, which had granted PCI's construction permit applications for the Seward translators. However, because the situation in Seward had not changed since the initial grant of PCI's translator licenses, the Commission decided to allow the continuation of the section 74.1231(b) waivers for the Seward translators. Nevertheless, the Commission cautioned that it might revisit the situation if a full-service FM station became operational in Seward. *Id.*, p. 8.

49. The Commission did not elaborate as to how it would revisit the situation or what

---

<sup>20</sup> See ¶ 20, *supra*.

action it might take. *Id.*, pp. 7-8. At the hearing, Mr. Becker allowed that he understood that the waivers granted for the Seward translators amounted to conditions on the licenses, which were subject to change. Tr. 198,319. Mr. Becker also recognized that the Commission found that the staff made a mistake when it granted the Seward construction permit applications. However, he argued that because the staff had delegated authority to grant the applications, the staff's mistakes were not his problem. Tr. 216.

50. Notwithstanding the Commission's affirmation of the grant of the assignment applications, PCI and Coastal did not attempt to consummate their deal. Tr. 215. Coastal allowed its tentative SBA loan to lapse. EB Ex. 16; EB Ex. 17. Mr. Becker believed that, as matters now stood, four of the nine translators had been rendered "worthless" because the Kodiak translators were no longer receiving PCI programming and may not be able to do so in the future and the Seward translators faced possible extinction as soon as a full-service FM station came on line in Seward. PCI Ex. 1, p. 8; Tr. 215,326, 329-30. Although Mr. Becker understood that PCI and Coastal could have changed the APA to account for the new circumstances relative to the Kodiak and Seward translators, they refused to do so. Tr. 327.

51. PCI did not reject the conditional grants pursuant to section 1.110 of the Commission's rules. Rather, PCI filed a petition for reconsideration." EB Ex. 14; Tr. 212. PCI argued that it had received waivers of section 74.1231(b) of the rules for the Kodiak translators

---

<sup>21</sup> Remarkably, Coastal did not file anything. Tr. 214.

when those stations were originally licensed in the 1980s.<sup>22</sup> Thus, according to PCI, grant of Coastal applications would merely restore what PCI had when the stations first began operations. EB Ex. 14, pp. 4-5. PCI also argued that the Commission should have granted Coastal's applications because, PCI claimed, the staff had granted waivers of section 74.1231(b) of the rules to other Alaskan broadcasters even though no "white area" was going to be served. *Id.*, pp. 6-9; Tr. 381-85. In this regard, however, Mr. Becker acknowledged at the hearing that he did not know whether certain of the translators cited in PCI's petition for reconsideration provided fill-in service or involved non-commercial educational stations. Tr. 435-440. Moreover, Mr. Becker knew as of the hearing that the license of the allegedly similarly-situated translator had been cancelled. Tr. 441.

52. With respect to the Seward translators, PCI contended that new license renewal procedures adopted by the Commission required unconditional renewal of the Seward translator licenses. EB Ex. 14, pp. 10-12. In addition, PCI argued that "basic fairness" dictated that the Commission should grant their renewals without the threat that the licenses could be terminated in the future upon commencement of a full-service FM station in Seward. In this regard, PCI noted that it had found a buyer as directed by the staff but that it could not deliver all of the translators to Coastal as promised because of the possible loss of the signal delivery waivers for the Seward stations. PCI complained that the 1996 staff letter (Off. Not. **Ex. 8**) did not indicate

---

<sup>22</sup> The license for Station K272BW, Kodiak, shows that its input was KGTL-FM's SCA, while the license for K285AA, Kodiak, shows that it received the signal of KGTL-FM "Direct," i.e., over the air. Neither license indicates that the translator in question received its primary station's signal via satellite. EB Ex. 4, p. 62; EB Ex. 9, p. 54.

that the Seward translator license renewal applications might only be granted on a temporary basis in the event PCI agreed to sell the stations. PCI claimed that it agreed to divest its translators based on the understanding that their license renewals would be conditioned only upon consummation of assignments and that it was inherently unfair for the Commission to fail to uphold its “end of the bargain.” *Id.*, pp. 12-14 (quotes in original). At the hearing, however, Mr. Becker recognized that the signal delivery waivers granted for the Seward translators could be modified if the correct procedures were followed. Tr. 198.

53. PCI closed its petition for reconsideration with a plea for its continued operation of the translators in the event the Commission chose not to grant its other requests. PCI noted that it had operated some of the translators for as long as 15 years. PCI stated that it had spent “substantial funds” to build the translator stations and had dutifully served the public interest by providing valuable broadcast services. **EB Ex.** 14, pp. 15-16. Following the close of the pleading cycle for the petition for reconsideration, PCI filed a motion to stay its obligation to consummate the assignment of licenses and assets of the nine translators. Off. Not. **Ex.** 12, p. 2.

## **J. PCI ORDERED TO SELL OR RISK LOSS OF THE TRANSLATORS**

54. By *Memorandum Opinion and Order*, FCC 00-45, released February 14, 2000,<sup>23</sup> the Commission dismissed PCI’s petition for reconsideration and motion to stay. Off. Not. **Ex.** 12. With respect to the former, the Commission held that none of PCI’s arguments met the standards for reconsideration set forth in section 1.106 of the rules. As to the latter, the Commission

---

<sup>23</sup> *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) (“February 2000 MO&O”)

observed that PCI had already delayed consummation of the assignments for more than a year since release of the Commission's order requiring the assignments and more than five years since the expiration of the three-year grace period for licensees to come into compliance with the new translator rules. Consequently, the Commission ordered that if PCI did not divest ownership of the translators within 30 days of the date of the instant order, the staff should rescind the conditional grants of renewal, cancel the translators' call signs, and terminate operating authority. *Id.*, p. 2.

55. The Commission also addressed a petition for reconsideration filed by Glacier Communications, Inc. ("Glacier"), the entity that now held the construction permit for a new full service FM station in Seward. Glacier sought the termination of the signal delivery waivers previously granted PCI's Seward translators. Glacier stated that it had constructed full-service station KPFN(FM), Seward and had commenced broadcast operations. Glacier alleged, and PCI did not rebut, that PCI's translators were taking between \$4,000 and \$6,000 per month in radio revenues out of Seward, which had less than 5,000 people and which had limited sources of advertising revenue. After determining that PCI's translators did not serve any "white areas," the Commission concluded that continuing PCI's waivers of section 74.1231(b) of the rules would be a clear detriment to the continued viability of full service broadcast stations licensed to Seward. The Commission therefore ordered termination of the waivers within 60 days of the release of the *February 2000 MO&O*. *Id.*, p. 3.

56. Mr. Becker understood that the Commission's *February 2000 MO&O* required consummation of the assignments with Coastal and that, if consummation did not occur, PCI

risked the loss of the translator licenses. Tr. 237. However, as far as he was concerned, PCI's deal with Coastal was over.<sup>24</sup> Tr. 220; 409. Consequently, PCI responded to the Commission's *February 2000 MO&O* by filing motions for stay both with the Commission and the D.C. Circuit. EB Ex. 18; EB Ex. 19; EB Ex. 26; Tr. 236,331. PCI also filed an appeal with the D.C. Circuit.<sup>25</sup> Off. Not. Ex. 13, p. 4.

57. In its motions for stay, PCI argued, *inter alia*, that the Commission lacked the statutory authority to issue conditional grants of renewal. PCI claimed that prior Commission decisions had found that its operation of the other area translators had been in the public interest, that there had been no serious violations of the rules, and that there had been no other violations by PCI, which would constitute a pattern of abuse. *E.g.*, EB Ex. 18, pp. 6-7. This argument ignores the fact that, beginning in September, 1996, the staff and the Commission had found (and PCI had conceded) that PCI's operation of seven of the translators violated section 74.1232(d) of the rules since June 1, 1994,<sup>26</sup> and that the orders to divest were issued in order to cure those violations prospectively. Off. Not. Ex. 8, p. 1; Off. Not. Ex. 11, p. 5; EB Ex. 3, p. 5; EB Ex. 4, p. 5; EB Ex. 5, p. 5; EB Ex. 6, p. 5; EB Ex. 7, p. 5; EB Ex. 8, p. 5; EB Ex. 9, p. 5. *See also* EB Ex.

---

<sup>24</sup> By letter dated March 1, 2000, Coastal observed, *inter alia*, that the Kodiak translators had become "useless." Coastal also recognized that the Seward translators would soon face termination. Coastal made it clear that it would buy PCI's translators only at a substantially reduced price from the \$100,000 price agreed upon in the APA. EB Ex. 19, pp. 4-5; Tr. 220, 409-10.

<sup>25</sup> Once again, Coastal filed nothing with the Commission or with the court.

<sup>26</sup> As noted in ¶ 34, *supra*, the staff recognized that PCI could reasonably have believed it had implicit waivers.

10, p. 7. The Commission did not act on PCI's motion for stay. The D.C. Circuit denied PCI's motion for stay on March 14, 2000. Off. Not. Ex. 13, p. 5.

58. In response to the D.C. Circuit's denial of its motion for stay, on March 15, 2000, PCI filed at the Commission its "Rejection of Conditional License Renewal and Assignment of License Grants" ("Rejection"), which purported to reject the conditional renewals issued by the staff and the Commission in 1997 and 1998, respectively, in accordance with section 1.110 of the rules. EB Ex. 20; Tr. 238-39, 423. PCI argued that, as a consequence of its filing, the Commission had to set the translator applications for hearing. PCI further asserted that it considered the Commission's conditional grants to be void. EB Ex. 20, p. 2; Tr. 424. Upon determining that PCI had filed the Rejection pleading with the Commission, the D.C. Circuit dismissed PCI's appeal without prejudice to its re-filing following the Commission's resolution of PCI's Rejection. Off. Not. Ex. 13, p. 5; Tr. 425.

#### **K. PCI IS ORDERED OFF THE AIR AND IGNORES COMMISSION ORDER**

59. By *Memorandum Opinion and Order and Order to Show Cause*, FCC 01-159, May 18, 2001,<sup>27</sup> the Commission dismissed PCI's Rejection as untimely, noting that PCI's filing had occurred years after the 30-day limitation for rejecting conditional renewals prescribed in section 1.110 of the rules. Off. Not. Ex. 13. The Commission also rescinded the conditional renewal and assignment grants, finding that PCI and Coastal had failed to consummate the assignments and that there was no reasonable likelihood that they would ever do so. In this regard, the

---

<sup>27</sup> *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001) ("Termination Order").

Commission noted that in March 2000, Coastal had informed PCI that it would not buy the translators at the agreed upon price given the circumstances that then pertained to the Kodiak and Seward translators. *Id.*, p. 4, n. 9, p. 6; EB Ex. 19, pp. 4-5. As a consequence of the rescissions, the Commission deleted the call signs of seven of the translators (Kenai, Kenai/Soldotna, Anchor Point, Homer, Kachemak City and the two in Kodiak) and ordered PCI to cease operating them at midnight on the day after release of the order. Off. Not. Ex. 13, p. 8. With respect to the Seward translators, the Commission commenced a proceeding pursuant to Section 316 of the Act to determine whether their licenses should be modified by the termination of the signal delivery waivers.” *Id.*, pp. 1-2, 8.

60. PCI did not become immediately aware of the **Termination Order**. However, Mr. Becker acknowledged at the hearing that he knew of the **Termination Order** within days of its release, and that he understood what the Commission had ordered, namely, that PCI turn off the seven named translators. Tr. 221-22. *See also* EB Ex. 1, p. 3; EB Ex. 2, p. 3 (Request # 13); EB Ex. 30, p. 339. Nevertheless, PCI continued to operate the translators. Tr. 222-23; EB Ex. 30, pp. 340-41. Mr. Becker also approved his counsel informing the Commission that PCI would not turn them off. Tr. 227; Off. Not. Ex. 14, p. 4. Mr. Becker and his wife understood that they were deliberately disobeying a Commission order by continuing to operate the translators. Tr. 223-25; EB Ex, 30, pp. 340-42. They disagreed with the **Termination Order**, and Mr. Becker took it upon himself to determine whether PCI should obey the Commission’s order. Tr. 232. On June 15,

---

<sup>28</sup> That proceeding remains pending. Tr. 348.

2001, PCI filed an appeal of the *Termination Order* with the D.C. Circuit.<sup>29</sup> Off. Not. Ex. 17, p. 5. At that time, PCI did not **seek** or obtain a stay of the *Termination Order*. Tr. 229.

61. After ascertaining that PCI had apparently continued to operate the translators in defiance of the *Termination Order*, the Commission by *Notice of Apparent Liability for Forfeiture and Order*, FCC 01-242, released August 29, 2001,” notified PCI of its apparent liability for a forfeiture of \$140,000. Off. Not. Ex. 14. In addition, the Commission ordered PCI to submit an affidavit informing whether PCI had ceased operating the translators and whether it intended to operate them in the future without authorization. The Commission explicitly warned PCI that continued operation of the translators might jeopardize its full power station licenses and remaining translator licenses. *Id.*, p. 5.

62. PCI submitted the required affidavit from Mr. Becker on September 10, 2001. EB Ex. 27; Tr. 245-46. Therein, Mr. Becker acknowledged PCI’s continued operation of the translators but argued that such operation was justified under the Commission’s rules and policies, citing sections 1.62 and 73.3523(d)(2) of the rules. Mr. Becker contended that, notwithstanding the *Termination Order*, PCI’s renewal applications remained pending by virtue of its court appeal, and their pendency allowed PCI to continue to operate the translators until the court decided PCI’s appeal. EB Ex. 27, pp. 2-3. Mr. Becker also argued that PCI’s continued

---

<sup>29</sup> *Peninsula Communications, Inc. v. FCC*, Case No. 01-1273 (D.C. Cir. filed June 15, 2001). See EB Ex. 27, p. 9. Briefs have been filed and oral argument is scheduled for January 2003.

<sup>30</sup> *Peninsula Communications, Inc.*, 16 FCC Rcd 16124 (2001) (“*NAL&Order*”). After considering PCI’s response, the Commission issued a *Forfeiture Order*, FCC 02-31, released February 6, 2002. *Peninsula Communications, Inc.*, 17 FCC Rcd 2832 (2002), *recon. denied*, 17 FCC Rcd 11456 (2002).

operation of the translators was necessary to preserve their licenses from automatic cancellation pursuant to Section 312(g) of the Act.<sup>31</sup> *Id.*, p. 4. Further, Mr. Becker contended that the Commission had not complied either with Section 309 or 312 of the Act and, thus, could not order PCI off the air until it held a hearing on the translators' renewal applications. *Id.*, pp. 4-5. Finally, Mr. Becker asserted that PCI would not "sacrifice" its statutory rights to operate the translators "under the duress and threat of an unwarranted and wholly inappropriate fine." *Id.*, p. 5.

63. Mr. Becker understood that the Commission had reiterated its earlier order that PCI stop operating the translators; however, PCI did not stop. Tr. 244. Mr. Becker also understood that by continuing to operate the translators, PCI was deliberately risking a Commission proceeding that could result in the loss of all of its licenses. Tr. 245. According to Mrs. Becker, PCI continued to operate the translators, despite the direct order from the Commission to shut them off, because "they are ours, they are licensed ours, and the way the FCC rules read we have every right to run them until it can be proved otherwise." EB Ex. 30, pp. 340-41.

64. In the meantime, the United States Attorney in Alaska had commenced a proceeding in July 2001, which sought to enjoin PCI from violating Section 301 of the Act with respect to its operation of the seven translators ordered off the air by the **Termination Order**. PCI Ex. 1, p. 9; Off. Not. Ex. 15, p. 1; Off. Not. Ex. 17, p. 5. On October 17, 2001, the Alaska District Court issued a preliminary injunction, which the United States Court of Appeals for the Ninth Circuit

---

<sup>31</sup> 47 U.S.C. § 312(g) provides: "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 ...."

(“9<sup>th</sup> Circuit”) affirmed in April 2002.<sup>32</sup> Off. Not. Ex. 16; Off. Not. Ex. 17; Off. Not. Ex. 18. In upholding the preliminary injunction, the 9<sup>th</sup> Circuit pointed out that filing an appeal with the D.C. Circuit did not excuse compliance with a Commission order, absent a decision by the D.C. Circuit to stay the order. Off. Not. Ex. 17, p. 7. In addition, the 9<sup>th</sup> Circuit emphatically rejected PCI’s arguments that under sections 1.62(a)(1) and 73.3523(d)(2) of the rules its renewal applications remained pending.<sup>33</sup> *Id.*, p. 12. Likewise, the court found without merit PCI’s arguments that the Commission had failed to comply with section 558(c) of the Administrative Procedure Act (5 U.S.C. § 558(c)), finding instead that “Peninsula’s renewal applications have been finally determined by the FCC’ so that, “even under section 558(c), Peninsula’s licenses have expired.” *Id.*, p. 13. As a result of various stays, the District Court’s preliminary injunction did not become effective (except for a five-day period in October 2001) until July 2002. *Id.*, p. 5, n. 6; Tr. 269-70.

65. Shortly after the 9<sup>th</sup> Circuit decided to affirm the preliminary injunction imposed by the District Court in Alaska, PCI responded to an inquiry from the United States Attorney as to whether and, if so, when it would shut down its translators. By letter dated May 25, 2002, PCI’s attorney in Alaska, Kenneth P. Jacobus, stated that PCI “cannot voluntarily cease operation

---

<sup>32</sup> *United States of America v. Peninsula Communications, Znc.*, 287 F.3d 832 (9<sup>th</sup> Cir. 2002).

<sup>33</sup> The court said: “Peninsula is wrong. The definition of “pending” in 47 C.F.R. § 73.3523(d)(2) is limited to proceedings under that section of the regulations, and thus does not apply to the renewal application procedure set forth in 47 C.F.R. § 1.62(a)(1). *See* 47 C.F.R. § 73.3523(d) (introducing definitions in that subsection with the limited phrase “[f]or the purpose of this section ...”). Therefore, Peninsula cannot revive its licenses by importing 47 C.F.R. § 73.3523(d)(2)’s definition of “pending” into 47 C.F.R. § 1.62(a)(1).”

because that will destroy the business and livelihood of the owners and employees.” EB Ex. 21. Although Mr. Becker attempted to distance himself from this statement during his hearing testimony, he testified during his deposition that he had authorized Mr. Jacobus’s letter and that the statement concerning the destruction of the business and livelihoods of the owners and employees was accurate. Tr. 104-08. See also Tr. 364-67. In addition, Mrs. Becker acknowledged that shutting off the translators would have a “devastating effect” on PCI’s business. EB Ex. 30, p. 341. See also *id*, pp. 347-48.

66. Following the 9<sup>th</sup> Circuit’s denial of PCI’s petition for rehearing on July 3, 2002, PCI filed a motion to stay the *Termination Order* with the D.C. Circuit. Off. Not. Ex. 19; Tr. 234, 263. The D.C. Circuit denied PCI’s motion on August 13, 2002. Off. Not. Ex. 20. PCI finally shut down the seven translators on August 28, 2002, announcing that it had “temporarily” suspended operation of the translators until the legality of the *Termination Order* was decided by the D.C. Circuit. EB Ex. 22; Tr. 331. At the hearing, Mr. Becker stated: “If the injunction had never been issued, I would be continuing to operate today under authority of 307(c)(3).” Tr. 266.

### **III. PROPOSED CONCLUSIONS OF LAW**

#### **A. PCI’S OPERATION OF TRANSLATORS POST AUGUST 29, 2001**

67. The first issue set forth in the *OSC* requires determination of the facts and circumstances surrounding PCI’s operation of various translators subsequent to August 29, 2001,

contrary to the *Termination Order* and its related violation of Section 416(c) of the Act.<sup>34</sup> *OSC*, 17FCC Rcd at 2842. As the Proposed Findings make clear, PCI operated the subject translators continuously from August 30,2001 to August 28,2002. In so doing, PCI knowingly disobeyed and deliberately defied the Commission inasmuch as the *Termination Order* remained in effect during that entire period. PCI stopped operating the translators only because of an injunction issued by the Alaska District Court, which PCI could not overturn on appeal or by a collateral attack at the D.C. Circuit. By Mr. Becker's own admission, PCI would still be operating the translators if the injunction had not issued and become effective. From our perspective, as discussed below, these facts alone justify revocation of all of PCI's licenses.

68. To the extent the presiding ALJ believes it is appropriate to examine the reasons why PCI decided intentionally to ignore a Commission order, the Proposed Findings demonstrate that PCI's actions stem from pique and the desire to keep making money in the hope that it will ultimately be vindicated in the D.C. Circuit. When challenged in 1996 by petitioners to deny and the Commission's staff, PCI acknowledged repeatedly that some of its translators violated the ownership rules and that the staff's remedial orders were proper. Moreover, as to the staff's orders, PCI argued that the translators' licenses should be kept viable until the Commission made a final determination. However, after the Commission affirmed the staff's actions and made its final decisions in the *December 1998 MO&O* and *February 2000 MO&O*, PCI refused to transfer ownership of the translators or renegotiate its deal because the Commission would not allow

---

<sup>34</sup> 47 U.S.C. § 416(c) states: "It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect."

Coastal to receive PCI's KWVV-FM and KPEN-FM in Kodiak via satellite and concluded that the waivers granted for PCI's Seward translators had been improvidently given and were subject to termination.<sup>35</sup> Instead, PCI started to stall and began to file pleadings containing arguments at odds with its earlier arguments that the staff's actions had been proper. Ultimately, after the *Termination Order* directly ordered PCI to take the translators off the air, PCI opted to take matters into its own hands and operate "its property" as it saw fit without regard for a Commission order directly to the contrary.

69. PCI continued to operate its translators after the *Termination Order* because it derived financial benefit from such operation and perceived it would suffer dire financial consequences should it turn them off. PCI also continued to operate the translators because, according to PCI, the Commission "wronged" PCI by initially stating in 1996 that the translators would remain on the air if they were sold to unaffiliated parties but later concluding in 1998 and again in 2000 that the Kodiak translators could not receive PCI's signals via satellite and that the Seward translators should be shut down.<sup>36</sup> Because its "deal" with Coastal was adversely affected by the 1998 and 2000 Commission decisions, PCI claims that its subsequent defiance of

---

<sup>35</sup> In this regard, both PCI and Coastal refused to go forward as they had contracted because they recognized that the value of the translators – which was based on their collective ability to bring PCI's KWVV-FM and KPEN-FM to the entire Kenai Peninsula and Kodiak – had been diminished significantly. As Mrs. Becker acknowledged, the principal value of the deal was keeping the network alive. That was no longer possible.

<sup>36</sup> Beginning in 1999, PCI argued that it would not have tried to sell the translators in the first place had it known that the Commission would effectively render useless the Kodiak and Seward translators. However, PCI never explained how it would have achieved compliance with section 74.1232(d) of the rules without divesting ownership of the translators.

the *Termination Order* was justified and that a court will ultimately vindicate its position. By such claims, PCI wishes to be perceived as the hapless victim of an uncaring government agency. The evidence shows otherwise; the Commission simply sought to implement its rules against a recalcitrant licensee. More to the point, regardless of whether PCI's beliefs that the Commission acted unfairly or improperly are ultimately vindicated through its appeal to the D.C. Circuit, PCI's beliefs do not excuse its actions. The *Termination Order* ordered PCI off the air; it intentionally did not comply.

70. In any event, contrary to PCI's arguments that it is a victim, the real victims in this case are PCI's competitors who have complied with the Commission's rules. PCI's unauthorized operations wounded its full-power competitors in Kodiak and Kenai/Soldotna, all of whom played by the rules when it came to other area translators. KSRM, Inc. turned off its other area translator on June 1, 1994 in order to comply with Commission rules, yet PCI decided to continue to broadcast after a direct Commission order to cease doing so. It is only now, after a court injunction shut down PCI's translators, that the full-power licensees both in Kodiak and in the Kenai/Soldotna area will be able to recoup advertising revenues lost to PCI. They are now able to preserve and enhance their ability to provide the kind ~~of~~ service the Commission expects and requires from full-service broadcasters.

71. Thus, it must be concluded that PCI knowingly operated in direct contravention of a Commission order. Moreover, it must be concluded that PCI's disobedience was unreasonable and unjustified. Finally, by its disobedience, PCI knowingly inflicted direct and continuing injury to competitors who operated in accordance with the rules.

## B. PCI'S CHARACTER QUALIFICATIONS

72. In determining whether an entity has the requisite character to be or remain a Commission licensee, the Commission has focused on two traits: truthfulness and reliability. With respect to the latter, the Commission's assessment is derived from an entity's demonstrated willingness or unwillingness to comply with the law generally and the Communications Act and the Commission's rules in particular. *Policy Regarding Character Qualifications In Broadcast Licensing*, 102 FCC 2d 1179, 1188-91 (1986) (subsequent history omitted) ("*Character Policy Statement*"); *Policy Regarding Character Qualifications In Broadcast Licensing*, 5 FCC Rcd 3252 (1990) (subsequent history omitted). Here, for a period lasting more than 15 months (from May 2001 through most of August 2002), PCI knowingly and deliberately chose to defy a direct, simple and unequivocal Commission order, the *Termination Order*. Further, PCI's defiance continued after the Commission issued the *NAL&Order*, which explicitly put PCI on notice that further disobedience of the *Termination Order* placed all of its Commission authorizations at risk. Finally, David Becker, PCI's president and chief operating officer, has stated that, but for a court injunction, PCI would still be defying the *Termination Order*.

73. Thus, by the own words and deeds of PCI's principals, the Beckers, PCI has demonstrated that it cannot be trusted to follow Commission directives with which it disagrees. This is intolerable because it is wholly at odds with the scheme of regulating radio transmissions established by Congress. The Commission has the exclusive authority to issue licenses and set their terms, conditions and periods. See Section 301 of the Act. More generally, the Commission has broad authority under Title III of the Act to regulate broadcasters. The

Commission cannot fulfill its statutory responsibilities if licensees simply ignore Commission orders because they don't like what the orders say. The Commission ordered PCI to cease operation of seven of its translators. Not only did PCI intentionally not cease operation, but David Becker, PCI's president, has boldly exclaimed that PCI would still be operating its translators were it not for a court injunction. PCI has thus demonstrated beyond any reasonable doubt that it cannot be relied upon to comply with Commission orders. PCI does not have the requisite character to be a Commission licensee.

#### **IV. ULTIMATE CONCLUSIONS**

74. Section 312(a) of the Act allows the Commission to revoke a station license for a variety of reasons, one of which includes: "(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States." Section **301** of the Act requires that radio transmissions in the United States can be made only in accordance with a license. That license allows for use, but not ownership, of radio channels and then only in accordance with the terms, conditions and periods of the license. In the case of translator licenses, the terms and conditions include compliance with rules governing ownership of other area translators, which ensure that translators function in the secondary role they are intended to fill. In the instant case, the Commission terminated PCI's operating authority for seven translators in May 2001 because it found them to be operating inconsistently with the translator

rules. Notwithstanding PCI's knowledge of the order terminating its authority, PCI continued to operate. Moreover, after being warned in August 2001 by the Commission in no uncertain terms that its actions violated Section 301 of the Act, and that it risked loss of all its licenses, PCI continued to operate for nearly a year before terminating operations on its unlicensed translators. Thus, clearly, PCI has willfully and repeatedly violated Section 301 of the Act by knowingly operating seven unlicensed translators for more than a year after the *Termination Order* and for nearly a year after the *NAL and Order*. It also willfully and repeatedly violated Section 416(c) of the Act by knowingly failing to observe and comply with a Commission order, which remained (and continues) in effect from May 19, 2001.

75. In determining the weight to be accorded acts of misconduct, the Commission considers the willfulness of the misconduct, its frequency and its currency. The Commission also takes note of the seriousness of the misconduct, the nature of the participation of managers and owners, and the efforts made to remedy the wrongs. Ordinarily, the Commission also takes into account the entity's record of compliance with FCC rules and policies. *Character Policy Statement*, 102FCC 2d at 1227-28. As discussed above, PCI's misconduct was intentional, extended for a substantial period of time, and did not end until the eve of the hearing in this proceeding, and then only because a preliminary injunction became effective. PCI's misconduct was serious, as it goes to the very heart of the Commission's regulatory authority, and it resulted from decisions made and actions taken by PCI's sole owners, the Beckers. In addition, PCI's current compliance with the *Termination Order* is tied to the preliminary injunction; should it end, PCI's Mr. Becker has so much as promised to resume operations on the seven translators.

Given this record, the Bureau submits that the harshest possible sanctions are both necessary and appropriate and that no consideration should be given to PCI's compliance with other FCC rules and policies."

76. The Commission has limited revocation or denial of renewal to one broadcast station license or fewer than all stations when it believed that such a sanction would suffice to ensure future compliance. *E.g., KQED, Inc.*, 5 FCC Rcd 1784, 1785 (1990) (subsequent history omitted). *Cf. James A. Kay, Jr.*, 17 FCC Rcd 1834, 1865 (2002), *on reconsideration*, 17 FCC Rcd 8554 (2002) (revocation all land mobile station licenses on the 800 MHz band but not other bands) (*appeal pending sub nom. James A. Kay, Jr. v. FCC*, Case No. 02-1175 (D.C. Cir. June 5, 2002)). Conversely, the Commission has revoked all licenses when it determined that a licensee's conduct so warranted. *E.g., Contemporary Media, Inc.* 13 FCC Rcd 14437, 14459-60 (1998) (subsequent history omitted); *Star Stations of Indiana, Inc.*, 51 FCC 2d 95 (1975) (subsequent history omitted). *Cf. Leslie D. Brewer*, 16 FCC Rcd 12878, 12883 (Enf. Bur. 2001) (flagrant and continuing refusal to comply with Section 301 of the Act warranted loss of Amateur Radio and General Mobile Radio Station licenses after licensee waived right to a hearing). The Commission does not presume that misconduct at one station is necessarily predictive of the operation of other stations; however, the Commission recognizes that some behavior may be so fundamental to a licensee's operation that it is relevant to its qualifications to hold any station license. *Character Policy Statement*, 102 FCC 2d at 1223.

---

<sup>37</sup> Should any such consideration be given, however, the Bureau notes that, for a period of several weeks in 1997, PCI intentionally operated the Kodiak translators with an unauthorized satellite delivery system.

77. PCI's knowing defiance of the *Termination Order* involved seven translators, which it used to illegally extend the reach of two of its full-power stations, WEN-FM and KWVV-FM. By doing so, PCI took revenues that would otherwise have been available to full-service licensees in Kodiak and Kenai/Soldotna. PCI did not stop its misconduct because to do so would have injured its own economic interest.

78. PCI's intentional defiance of a direct Commission order makes clear that loss of one broadcast station license will not suffice. PCI does not possess the requisite character to remain a Commission licensee. It has failed one of the two predictors of character; namely, reliability, by intentionally disobeying for more than a year a Commission order with which it disagreed. Even during the hearing, PCI showed no remorse. Based on the record in this proceeding, the Commission can have no confidence whatsoever that, should PCI remain a licensee, it would

ever comply with any Commission order with which it disagrees. Under these circumstances, the Bureau submits that the only appropriate response is revocation of all of PCI's licenses.

Respectfully submitted,



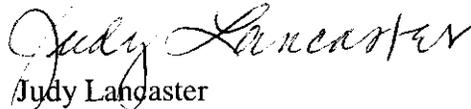
David H. Solomon  
Chief, Enforcement Bureau



Charles W. Kelley  
Chief, Investigations and Hearings Division



James W. Shook  
Attorney



Judy Lancaster  
Attorney

Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 3-B443  
Washington, D.C. 20554  
(202) 418-1420

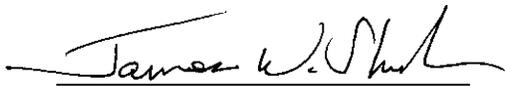
December 24, 2002

**Certificate of Service**

James W. Shook, an attorney in the Enforcement Bureau's Investigations and Hearings Division, certifies that he has on this 24th day of December, 2002, sent by email, by first class United States mail, or delivered by hand, one copy of the foregoing "Enforcement Bureau's Proposed Findings of Fact and Conclusions of Law" to each of the following:

Jeffrey D. Southmayd, Esquire (by email and by first class mail)  
Southmayd & Miller  
1220 19<sup>th</sup> Street, N.W., Suite 400  
Washington, D.C. 20036

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

  
\_\_\_\_\_  
James W. Shook