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

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

To Chief Administrative Law Judge
Richard L Sippel

ENFORCEMENT BUREAU'S REPLY TO FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PENINSULA COMMUNICATIONS, LNC.

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January 21,2003

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Summary

On May 18, 2001, the Commission released **a** *Memorandum Opinion and* ***Order*** ("*Termination Order*") that directed Peninsula Communications, Inc. ("PCI") to terminate operation of seven translators by midnight the following day. PCI did not do *so* until August 28, 2002, only after PCI agreed to comply with a preliminary injunction enforcing the *Termination Order*. Although PCI filed an appeal **with** Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") to overturn the *Termination Order* (which appeal is still pending), PCI never received a stay of the *Termination Order* from the Commission or the D.C. Circuit. Thus, from the time specified therein, the *Termination Order* has been effective, and PCI's failure to comply with it was intentional and continued for more than IS months. PCI's sustained, deliberate disobedience merits loss of all of its licenses.

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Licensee of stations	)	FRN: 000 1-5712-15
KGTL, Homer, Alaska;	)	Facility ID Nos. 52152
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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, Kachcmak City, Alaska:	)	
K272CN, Honicr, Alaska; and	)	
K274AB and K285AA, Kodiak, Alaska	)	

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ENFORCEMENT BUREAU'S REPLY TO FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PENINSULA COMMUNICATIONS, INC.

I. PRELIMINARY STATEMENT

1. On December **24,** 2002, Peninsula Communications, Inc. ("PCI") and the Enforcement Bureau ("Bureau") filed proposed findings of fact and conclusions of law ("PFCs"). Pursuant to Order, FCC 02M-I I0, released December 11, 2002, the Bureau hereby replies IO PCI's PFCs

The Bureau's decision not to reply to any particular finding or conclusion offered by PCI should not be construed as a concession to its accuracy or completeness. The Bureau continues to believe that its proposed findings of fact accurately and fairly present the relevant record evidence and that its proposed conclusions of law properly apply Commission and court precedent. Nothing in PCI's proposed findings and conclusions alters our strongly held view that all of PCI's licenses should he revoked.

II. REPLY FINDINGS/CONCLUSIONS

A. Critical Issue

2. In its PFCs at paragraphs 6-9 and 59-67, the Burcau repeatedly emphasized the **key** point in this proceeding: the Commission released an order (the "*Termination Order*"[1]) with which PCI intentionally failed *to* comply. The *Termination Order* directed PCI to cease operations on seven FM translators. PCI received the *Termination Order,* read it, understood it, and deliberately disobeyed it for a period of 15 months. **As** a consequence of PCI's deliberate, intentional disobedience, the only appropriate remedy is loss of PCI's authorizations to operate as a Commission licensee. *See* Burcau PFCs at paragraphs 72-78.

3. In its PFCs at paragraphs 28-34, PCI attempts to avoid the consequences of its own behavior by claiming that the Bureau never established that: 1) the Commission "released" the *Termination Order;* 2) the *Termination Order* was ever "in effect;" and 3) the *Termination Order*

[1] *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (May 18, 2001) *("Termination Order")* (Off. Nor. Ex. 13).

was "final." PCI further argues that it had a right to operate the translators while its appeal of the *Termination Order* was pending. Quite obviously, PCI has chosen to overlook a number of salient facts.

4. First, the *Termination Order,* which is in the record of this proceeding as Off. Not. Ex. 13, bears a release date of May 18, 2001. Moreover, at least two additional Commission records of which this court may take official notice, the Daily Digest and the publication known as FCC Records, reflect the *Termination Order's* release on May 18, 2001. Further, PCI's principal, David Bccker, and its counsel knew of *Termination Order* shortly after its release, regardless of when they actually received a copy from the Commission. Bureau PFCs at paragraph 60. Finally. on June 15, 2001, PCI filed and is currently prosecuting an appeal of the *Termination Order* before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), which PCI states was timely filed as it occurred "within thirty (30) days of the release of rhe *Termination Order."* PCI PFCs at paragraph 20. *See also* Bureau PFCs at paragi-aph 60. In light of the above, PCI's argument that the Bureau never established that the *Termination Order* was released is absurd.

5. Similarly ridiculous is PCI's argument that the Bureau never established that the *Termination Order* was in eftcct during all or a ponion of the period August 29, 2001 to August 28, 2002. As PCI itself recognizes in paragraph 30 of its PFCs, the effective date for a Commission action is date of public notice of such action, unless the Commission designates a diflerent date. 47 C.F.R. § 1.103(a). Public notice for a document such as the *Termination Order* is the document's release date. 47 C.F.R. § 1.4(b)(2). Thus, because it was <u>never</u> stayed

by it court or the Commission in accordance with 47 U.S.C. 408, the ***Termination Order*** became effective as of the date specified in the *Termination* ***Order,*** namely, May 19, 2001, and remained effective thereafter. In this regard, the United States Court of Appeals for the 9th Circuit ("9th Circuit") affirmed a preliminary injunction premised on the ***Termination Order*** and, subsequently, the D.C. Circuit denied PCI's motion to stay the *Termination* ***Order.*** *See* Bureau PFCs at paragraphs 64 and 66.

6. As to the finality of the ***Termination Order***, 47 C.F.R. § 1.103(b) provides that a Cornmission action is final for FCC purposes on the date of public notice. As noted above, that date was May 18, 2001, the date the Commission released the ***Termination Order.*** Of course, the Bureau recognizes that the *Termination* ***Order*** not only terminated PCI's operating authority for the seven translators as of May 19, 2001, hut also commenced a proceeding under47 U.S.C.§ 316 to dctcrmine whether PCI's licenses tot translators in Seward should be modified.[2] However, the latter had no impact whatsoever on the former, a fact recognized by the 9th Circuit in upholding the preliminary injunction against PCI. *See* Bureau PFCs at paragraph 64

[2] PCI argues in paragraph 33 of its PFCs that the *Termination* ***Order's*** institution of the Seward proceeding rendered that order "non-final" for the purposes of all actions taken therein. PCI cites three cases, all of which arc distinguishable. In *Bellsouth* ***Corporation*** *v. FCC*, 17 F.3d 1487 (D.C. Cir. 1994) and ***United*** *Transportation Union* v. *ICC*, 871 F.2d 1 I14 (D.C. Cir. 1989), entities filed both a court appeal and a petition seeking Commission reconsideration of the same order. The court in both cases dismissed the appeals as premature since agency reconsideration could conceivably render the appeals moot. Obviously, that is not the case with PCI as there is no action that the Commission can take relative to the Seward translators that would have any impact on the seven translators whose licenses were canceled. In *ICC v. Brotherhood of Locomotive* ***Engineers,*** **482** U.S. 270 (1987), the Court ordered dismissal of an appeal of an ICC order denying reconsideration, which appeal merely argued that the underlying agency order contained material error. PCI does not even attempt to demonstrate how that case has any relevance to PCI's current situation, and we can perceive none.

Advancing a different theory in paragraph 20 of its PFCs, PCI suggests that its appeal of the *Termination Order* rendered it "non-final." However, the Communications Act makes quite clear that neither a petition for reconsideration nor an appeal has any impact on the finality or effectiveness of an order issued by the Commission. *See* 47 U.S.C.§§ 402,405 and 408; *United States v. Peninsula Communications, Inc.*. 287 F.3d 832 (9th Cir. 2002) (Off. Not. **Ex.** 17, p. 7). *See also* 47 C.F.R. § 1.106(n).

7. One other matter deserves mention at ihis point. In paragraphs 36-39 of its PFCs, PCI contends that the decisions of the Assistant United States Attorney in Alaska ("AUSA") to forbear from prosecuting PCI for violations of the preliminary injunction somehow gave it the right to conrinue to operate the ti-anslators ordered off the air in the *Termination Order*. As PCI well knows, the *Termination Order* was cffcctive for <u>five months</u> (May 18,2001 to October 17, 2001) <u>before</u> the District Court in Alaska issued the preliminary injunction to enjoin PCl's conunuing violation of 47 U.S.C. § 301. Moreover, thereafter, while the effectiveness of the <u>preliminary injunction</u> was delayed until August 28, 2002, PCI never rcccivcd a stay of the *Termination Order*. PCI stopped broadcasting on the translators only when faced wirh the pi-ospcct of punishment for violating the preliminary injunction. Tr. 267-71. As demonstrated above. however, the *Termination Order* remained valid throughout. It is PCl's sustained flouting of the *Termination Order* which has placed PCl's authorizations in jeopardy. PCl's ability to delay issuance of the preliminary injunciion and to avoid the impact of the preliminary injunction for ten months as well as its current compliance with it are irrelevant to its failure to abide by the *Termination Order*.

8. Accordingly, as the Bureau's PFCs demonstrated, for a period of 15 months (hardly the "single act of misconduct" asscrtcd by PCI in paragraph 44 of its PFCs) PCI operated seven translators in deliberate defiance of an eflective, unambiguous, final Commission order to the contrary. For the reasons set forth in the Bureau's conclusions of law at paragraphs 74-78 of its PFCs. PCI's misconduct merits the ultimate sanction: the loss of all of its authorizations.

B. Other Matters[3]

9. In paragraphs 3 and 45 of its PFCs, PCI erroneously contends that it has a spotless record. except for its failure to comply with the *Termination Order.* PCI is wrong. Simply because the Commission had not previously taken enforcement action against PCI does not mean that PCI has not previously violated the rules. In this regard, as pointed out in the Bureau's PFCs at paragraph 42, PCI, tor several weeks in the autumn of 1997, supplied programming to its translators in Kodiak via satellite. contrary to the stations' licenses and the Commission's rules. Thus, cvcn without consideration of PCI's defiance of the *Termination Order*, PCI's record cannot be viewed as "spotless."[4] Moreover, PCI's misbehavior in violating the *Termination*

[3] To ensure that the record is accurately portrayed in the Initial Decision, the Bureau will address various claims and arguments made by PCI in the order in which they were raised. We note, howcvcr, that most or all of these matters are irrelevant in any event given PCI's flagrant refusal to comply with the *Termination Order*'s unambiguous requirement to cease operation.

[4] The Bureau also notes that, contrary to 47 C.F.R. § 73.1015, which requires the submission of complete, accurate information in an application, PCI claimed, falsely, that it had received waivers *of* sections 73.1232(d) and (e) for all of its non-fill-in translators when those stations were originally licensed. In point of fact, PCI clearly had not received such waivers for its Kodiak stations or its Kenai station. Tr. 314-15. More to the point, PCI had received a waiver of current section 74.1232(d) only for its Seward stations. See Bureau PFCs at paragraphs 32-34.

Order is itself so egregious that it justifies revocation even if PCI had a previously unblemished record.

10. In paragraph 6 of its PFCs, PCI asserts that it "received FCC permission" to operate the seven listed translators "at variance with the Commission's rules and regulations" when they first received construction permits. Similarly, in paragraph 7, PCI claims that the staff granted PCI "blanket" rule waivers. PCI is wrong. Paragraphs 14, 16, 17 and 23 of the Bureau's PFCs accurately set forth the circumstances sun-ounding the initial grants of the station's licenses. In thi-ce of those instances (the two Kodiak stations and the one in Kenai). PCI did not request or receive a waiver of the pertinent rule governing ownership, while in three other cases (Anchor Point, Kachemak City and Homer), the staff granted PCI's applications without ruling on PCI's waiver requests of former section 74.1232(d) of the rules. Thus, only in the case of the Kenai/Soldotna station did the staff knowingly issue a license at variance with the letter and spirit of former section 74.1232(d) of the rules. In any event. as discussed in paragraphs 19-21 of the Bureau's PFCs. the translator rules. including section 74.1232(d), changed. Moreover, beginning in 1996, the Commission, whether at the staff level or above, consistently ruled that PCI's ownership of the seven translators was contrary to the rules. *See* Bureau PFCs at paragraphs 33-34, 40, 43, 46, 54 and 59. PCI defended these rulings when it served its purposes and only began to attack them when PCI could not achieve the deal it wanted with Coastal Broadcast Communications, Inc. ("Coastal"). *See* Bureau PFCs at paragraphs 35, 44, 46-53.

11. At the conclusion of paragraph 7 of its PFCs, PCI disingenuously claims that, in December 1998, the Commission approved special temporary authorizations ("STAs"), which

allowed PCI to operate its Kodink translators "to recommence service pursuant to ... waivers that had been applied for in 1997." The Commission did no such thing. In the *December* 1998 *MO&O*,[5] the Commission denied Coastal's applications to deliver PCI's full-power stations' signals to the Kodiak translators via satellite, a ruling for which PCI, but not Coastal, sought reconsideration (which was dismissed) because it rendered the Kodiak translators "worthless." *See* Bureau PFCs at paragraphs 46-47, and 50-51. **As** a consequence, PCI continued to broadcast the programming of the Kodiak Community Church, instead of resuming broadcast of PCI's KWVV-FM and KPEN-FM, until January 2001. *See* Bureau PFCs at paragraphs 29 and 42. *See also* Oft. Not. Ex. 13 at n. 4. Had the Commission actually granted the STAs in question in December 1998. there is no rational explanation as to why PCI waited until January 2001 to resume rebroadcasts of its own stations.[6] In any event, even if such prior authorization had been given, the *Termination Order* required PCI to cease operation in unambiguous terms. **As** we have pointed out repeatedly, the fact that PCI may have thought the *Termination Order* was wrongly decided does not justify ignoring it.

12. PCI declares in paragraph 8 of its PFCs (hat other FM translator licensees were authorized with, and continue to operate at this time, waivers similar to those granted at one time

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[5] *Peninsula Communications, Inc.*, 13 FCC Rcd 23992 (1998) (*"December* 1998*MO&O*") (Off Not. Ex. 11)

[6] The Bureau acknowledges that PCI's exhibits may raise a question. However, considering the totality of the circumstances, including the timing of the introduction of these exhibits (the post-hearing admissions session), the absence of any testimony from Mr. Becker *that* a grant of STAs occurred and that PCI took advantage of that grant, and the fact that the so-called grants are directly contrary to the Commission's treatment of Coastal's applications, the weight of the evidence demonstrates that there were no grants.

to PCI. Aside from being inelevant to the designated issues, PCI's evidence in support of this claim is non-existent. As Mr. Becker repeatedly acknowledged on cross examination, the translators in question. as tar as he knew, provided fill-in service or involved non-commercial stations (and theiefore operated without the need for waivers), or concerned a station whose license was canceled. *See* Bureau PFCs at paragraph 51.

13. In paragraph 9 of its PFCs, PCI characterizes as a "disclosure" assertions in its 1995 renewal applications for the non-fill-in translators that it had received waivers of sections 74.1232(d) and (e). As noted earlier (see *supra* note 4), PCI's "disclosures" were both misleading and irrelevant. Thus, instead of simply informing the Commission that it was operating under waivers and that it intended to continue to do so, PCI clearly was claiming rights it simply did not have.

14. In footnote 6 of its PFCs, PCI asserts that all of the witnesses produced by the Bureau lack credibility because they are involved with companies that have been trying get PCI's translators off the air. The Bureau disagrees. As discussed in the Bureau's PFCs at paragraphs 26-31, the Bureau's witnesses provided evidence about the competitive harm PCI's translators have inflicted on [heir operations – harm resulting directly from PCI's refusal to abide by the Commission's translator rules. Their desire to have the rules upheld is hardly a basis for inferring a lack of credibility. Indeed, if there is any credibility problem, it lies with Mr. and Mrs. Becker, who operated, and seek to continue the operation of, PCI's translators, notwithstanding that the Commission's rules have flatly prohibited such operation since June 1, 1994. In this regard, the Bureau notes, *inter alia*, Mr. Becker's insistence that his role in

preparing Coastal's Kodiak applications was "technical" and that he merely assisted Coastal's Mr. Buchanan in putting the applications together. *See* Bureau PFCs at paragraph 41. As discussed, all of the information in the applications came from PCI. Moreover, if the applications were really Coastal's. it, not PCI, would have sought reconsideration for their denial. *See* Bureau PFCs at paragraphs 41,47, 51

IS. PCI suggests in paragraph 10 of its PFCs that the Cornmission was somehow obligated to Five PCI personal notice that the rules governing the operation of its translators changed in 1991. PCI conveniently forgets that it received all the notice to which it was entitled because the Commission had the pertinent rules, as well as the Notice of Inquiry, Notice of Proposed Rulemaking, Report and Order, and reconsideration order published in the Federal Register. *See* Bureau PFCs at notes 8-10 and 13; 5 U.S.C. § 552(a)(1)(D) and (E), and 5 U.S.C. § 553.

16. PCI attempts to garner sympathy by contending in paragraph 16 of its PFCs that, "through no fault of its own," it was unable to sell its ti-anslators as ordered by the Commission. But PCI refused to sell individual translators, requiring instead that they be purchased as an all-inclusive group. Tr. 174-75, 326-27. Also, when problems arose, PCI refused to negotiate with Coastal to account for the changed circumstances affecting the Kodiak and Seward translators. Tr. 409-10. Considering that PCI subsequently sold a different translator (Tr. 315-16), one could infer that the translators PCI wanted to sell to Coastal could also have been sold had they been marketed and priced appropriately.

17. PCI states in footnote 7 of its PFCs that it objected to (and sought reconsideration of)

the condition imposed in the staff's November 6. 1997, letter (Off. Not. Ex. 10) that consummation of the assignment to Coastal was subject to renewal of PCI's 1997 renewal applications. PCI made no such objection. Indeed, as pointed out in the Bureau's PFCs at paragraph 44, PCI argued that the staff's actions were consistent with the law.

18. In paragraph 17 of its PFCs, PCI incorrectly asserts as fact that its rejection of the conditional license renewals for its translators was timely. While PCI notes in paragraph 19 of its PFCs that the Commission ultimately dismissed PCI's rejection, it neglects to point out that the *Termination Order* dismissed PCI's rejection as untimely. *See* Bureau PFCs at paragraph 59.

19. PCI states in paragraphs 20 and 24 of its PFCs that its counsel notified the Commission that PCI intended to operate translator stations while it pursued a court appeal in conformity with Commission precedent.[7] In point of fact, the only thing PCI did through its counsel was inform the Commission that it did not intend to turn its translators off. Tr. 227; Off. Not. Ex. 14, p. 4. More importantly, the fact that PCI told the Commission that it intended to act unlawfully docs not make such unlawful behavior acceptable.

20. In paragraph 26 of its PFCs. PCI states that in its *February* 2000 *MO&O*,[8] the Commission ordered PCI to shut off its Seward translators within sixty (60) days of that order's release. PCI further observes that no sanction resulted from its continuing to operate the Seward

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[7] Although not entirely clear, it appears that the referenced conversation occurred during the week following the release of the *Termination Order*, that is, between **May** 21 and 25, 2001. PCI filed its appeal on June 15, 2001.

[8] *Peninsula Communications. Inc.*, 15 FCC Rcd 3293 (2000) (*"February* 2000 *MO&O*") (Off. Not. Ex. 12).

translators following the sixty (60) day period established in the *Fehruarv* 2000 *MO&O*. PCI claims that it attributed the absence of sanctions to the filing of its appeal of the *February* 2000 *MO&O* in March 2000.

21. As a preliminary inatter, PCI has not accurately described the *February* 2000 *MO&O*. Specifically, although the Commission ordered that the Seward waivers be tenninated 60 days from the release date of the order (*see* Off. Not. Ex. 12, p. 4, paragraph IS), the *Fehruury 2000 MO&O* did not itself order PCI off the air. Rather, the *February* 2000 *MO&O* ordered the staff to terminate the translators' operating authority if PCI and Coastal did not consummate the authorized assignments. *See id,* paragraph 13. Given that the staff did not do so despite the failure to consummate, PCI did not itself violate a Commission order in that situation.

22. In any event, PCI apparently means to suggest that because its March 2000 court appeal supposedly prevented the staff from ordering PCI off the air pursuant *to* the *February 2000 MO&O*. PCI should have received a pass for violating the *Termination Order,* which did order PCI off the air. hccausc it filed an appeal of that order. If PCI is so suggesting, it is wi-ong both on the facts and the law. First and most significantly, the fact that the staff did not order PCI off the air after the *February 2000 MO&O* is not a basis for ignoring the *Termination Order,* which did order PCI off the air. Moreover, given that the D.C. Circuit dismissed PCI's March 2000 appeal in July 2000,[9] there is no basis for Mr. Becker's asserted "belief' that PCI's appeal

[9] The court dismissed PCI's appeal without prejudice on July 11, 2000, to allow the Commission the opportunity to rule on PCI's "Rejection of Conditional License Renewal and Assignment of License Grants," which it filed with the Commission on March 15, 2000 Off. Not. Ex. 13. p. 5. See *also* Bureau PFCs at paragraph 58.

of the *February 2000 MO&O* prevented the staff from ordering PCI off the air. Thus, the staff's decision to forbear from ordering PCI off the air following the *February* 2000 *MO&O* provides no justification for PCI's operation of the seven translators ordered off the air by the *Termination Order*.

23. PCI's PFCs at paragraph 27 set forth PCI's final justification for operation of the translators subsequent to the *Termination Order* – namely, Mr. Becker's belief that 47 U.S.C. § 312(g) would lead to loss of the licenses if PCI complied with the *Termination Order*. In the *Order to Show Cause,* 17 FCC Rcd 2838, 2840-41 *(2002)*("*OSC*"), the Commission addressed and rejected that argument. To the extent that PCI's Mr. Becker ever genuinely held such a belief, the *OSC* provided ample warning to PCI that its reliance on 47 U.S.C. § 312(g) as justification for its operation of translators contrary to the *Termination Order* was untenable.

III. ULTIMATE CONCLUSION

24. PCI's proposed findings and conclusions are replete with errors of fact and law. as well as patently ridiculous arguments (*see* paragraphs 4 and 5, *supra*), and they provide no basis for allowing PCI's continued operation of broadcast stations. Indeed, if anything, they underscore the fact that PCI cannot be trusted in the future to comply with the law. Thus, as the Bureau's PFCs amply demonstrate, by deliberately violating the Commission's *Termination Order* lor a period of 15 months – 12 of which occurred after being notified of a substantial forfeiture and warned in no uncertain terms by the Commission that continued operation of the terminated translators placed all of its licenses in jeopardy – and by boldly proclaiming that it

would have continued to operate the translators but for the preliminary injunction, PCI dcscrvcs nothing less than revocation of all of its authoriaations. A decision to the contrary would simply encourage future lawlessness by PCI and others.

Respectfully submitted

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January 23, 2003

Certificate of Service

James W. Shook. an attorney in the Enforcement Bureau's Investigations and Hearings Division, certifies that he has on this 23rd day of January, 2003, sent by email, by first class United States mail, or delivered by hand, one copy of the foregoing "Enforcement Bureau's Reply to Findings of Fact and Conclusions of Law of Peninsula Communications, Inc." to each of the following:

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