

No. 01-35965

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 PENINSULA COMMUNICATIONS,)
 INC.)
)
 Defendant-Appellant.)
 _____)

**PETITION FOR PANEL REHEARING AND
REHEARING EN BANC OF APPELLANT,
PENINSULA COMMUNICATIONS, INC.**

Appeal from the United States District Court
District of Alaska, Judge John W. Sedwick,
United States District Court No. CV-01-207 (JWS)

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QUESTIONS PRESENTED ON REHEARING

Panel and En Banc Rehearings

(1) Do the existing licenses of Peninsula Communications, Inc., in accord with a policy of the FCC based on an extension of 47 U.S.C. §307(c)(3), authorize continued operation of the translators pending the completion of appellate proceedings before the D.C. Circuit Court of Appeals?

(2) May PCI be forced to suspend its translator operations under an FCC order which has not yet been determined to be a final order?

(3) Is PCI entitled to the protections of 5 U.S.C. §558(c) with respect to this proceeding?

En Banc Rehearing Only

(4) Does the District Court have jurisdiction to enforce an order of the Federal Communications Commission (FCC) pursuant to 47 U.S.C. 401(b) under the facts of this case? This section requires that the District Court determine that the FCC order was "regularly made." However, the question of whether the order was regularly made is before the Court of Appeals for the District of Columbia, and that decision is within the jurisdiction of that Court pursuant to 47 U.S.C. §402(c).

(5) Is PCI entitled to a hearing before the District Court as mandated by the language of 47 U.S.C. §401(b)?

STATEMENT OF FACTS

Peninsula Communications, Inc., (PCI) owns nine FM translator stations in a rural area of Alaska, as well as the translators' two primary FM stations. In September, 1996, the Federal Communications Commission (FCC) directed PCI to divest itself of the translators as a condition of license renewal. PCI attempted to do so, but certain conditions subsequently placed on the renewal by the FCC forced the purchaser of the translators to back out of the purchase agreement.

In May, 2001, the FCC issued a Memorandum Opinion and Order to Show Cause (the "Termination Order", Appendix A), in which it determined that it was unlikely that PCI would ever complete the transfer of the translator licenses, rescinded conditional grants of renewal applications with respect to seven of the translators, and ordered PCI to shut them down by May 19, 2001. On June 15, 2002, PCI appealed this decision to the Court of Appeals for the District of Columbia Circuit in accord with 47 U.S.C. §402.

COURSE OF PROCEEDINGS AND DISPOSITION

In July 2001, the United States filed this action in the United States District Court for the District of Alaska, pursuant to 47 U.S.C. §402(b), and a motion for

preliminary injunction requiring that the translators be shut down. PCI then moved to dismiss the action for lack of jurisdiction and requested a stay pending completion of the proceedings pending before the Court of Appeals for the D.C. Circuit. The District Court denied the motion for dismissal for lack of jurisdiction, denied the motion for stay, and granted the motion of the United States for a preliminary injunction. PCI filed a motion for reconsideration, and a second motion for stay of proceedings, both of which were denied. On October 18, 2001, PCI appealed these denials to this Court. On November 21, 2001, this Court entered a stay of the preliminary injunction pending resolution of this appeal. In an April 22, 2002, opinion of this Court, Judges Alarcon and Silverman, and Senior District Judge Brewster, affirmed the preliminary injunction and vacated the November 21, 2001, stay.

ARGUMENT

Rehearing should be granted by the panel in this case because there have been material questions of fact or law overlooked or not ruled upon in the decision.

Rehearing En Banc should be granted because the question of the relationships between this Court and the D.C. Circuit relating to administrative agency enforcement cases, and the jurisdictional relationship between the District

Court for the District of Alaska relating to who may decide the question of whether the order was "regularly made" are questions of exceptional importance which do not appear to have been ruled on in any other reported case. In addition, whether a federal statute such as 47 U.S.C. §401(b), which mandates the holding of a hearing, means exactly what it says is another issue of exceptional importance.

I. PENINSULA COMMUNICATIONS, INC., SHOULD BE ALLOWED TO OPERATE UNTIL COMPLETION OF ALL APPELLATE PROCEEDINGS (47 U.S.C. §307(c)(3)).

Allowing the licensee to continue operation pending completion of an appeal has always been a general policy of the FCC. This policy is articulated by the FCC as follows:

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

This policy is based on 47 U.S.C. §307(c)(3), which specifically provides:

(3) Continuation pending decision. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 [47 USC §405], the Commission shall continue such license in effect. ^{1 2}

¹ The term "pending" is not specifically defined in this section. However, the Court of Appeals for the District of Columbia Circuit has noted that this "pending" provision of 47 U.S.C. §307(c)(3) and 5 U.S.C. §588(c) (the Administrative Procedures Act) "...share an identical purpose - the protection of licensees from

Section 405 provides for the filing of petitions for reconsideration of action by the FCC. Section 405(b)(2) also specifies that appeals taken under section 402(a) come within the scope of that section. As the record demonstrates, PCI's license renewal applications are the subject of applications for review before the United States Court of Appeals for the D.C. Circuit that were timely filed pursuant to section 405(b)(2). PCI's licenses, and its right to continue to operate the FM translators, remain valid under the above-referenced provisions of the Act, which require that the FCC continue the licenses in effect until a final decision is reached on the matter in question. Thus, the FCC action in the "Termination Order" requiring PCI to cease operation of its FM translators also became null and void upon the timely filing of the notice of appeal because the licenses to operate continued in effect.

Therefore, "pending any hearing and final decision" on an application, the

uncertainties stemming from protracted administrative consideration." Committee for Open Media v. F.C.C., 543 F.2d 861, 867 (D.C. Cir. 1976) This interpretation is entirely consistent with the definition of "pending" in 47 U.S.C. §311(c)(4) and (d)(4), which expressly extend to "review by any court."

² The FCC did not extend this policy to PCI. Under the circumstances of this case (no hearings, FCC at fault for PCI non-compliance, etc.), it should have. Even if there is FCC discretion, there does not appear to be any authority or standards to determine when the FCC will extend this policy, and when it will not. Accordingly, whether or not the FCC policy should have been extended to PCI will be reviewed as a possible "arbitrary and capricious" decision by the Court of Appeals for the District of Columbia Circuit in accord with 5 U.S.C. §706.

Commission must continue the license in effect. It is not a matter of discretion, but the licenses must remain in effect as a matter of law. At the present time, there are hearings pending, which will lead to additional decisions, which are hearings and decisions of the type which require the license to be continued in effect.

The FCC has "properly recognized that a renewal case is not completed until there is a final order." Application of Faith Center, Inc., 82 FCC 2d 1, 40 (1980) In Faith Center, the FCC denied the renewal application of a broadcast station (TV) licensee. The licensee did not participate in the required discovery in good faith, and consistently failed to answer required interrogatories and produce required documents. Nevertheless, the FCC expressly noted that if the licensee sought reconsideration by the Commission or judicial review of the action that the licensee would be authorized to continue operation until 30 days after the forum which has jurisdiction to review that proceeding issued its mandate. (82 FCC at 40, para. 94) The same thing took place in Contemporary Media, Inc. v. F.C.C., 215 F.3d 187 (D.C. Cir. 2000) and Application of Pinelands, Inc., 7 FCC Rcd 6058 (1992). No matter how unreasonable the actions of the licensee might have been, the FCC always allows a licensee to continue to operate its broadcast station within the context of a license renewal or license revocation proceeding as long as

an FCC order remains subject to "reconsideration by the Commission or to review by any court", such as exists here.

In addition, it is necessary to allow PCI to remain in operation pending the completion of the appeal. The presently pending appeal to the Court of Appeals for the D.C. Circuit will take more than a year to complete. If Peninsula Communications is forced to shut down these FM translators now, it will lose the right to operate them entirely, even if it prevails on its appeal.

47 U.S.C. §312(g) of the Communications Act of 1934, as amended, is implemented by 47 CFR §73.1750. This section provides:

...the license of any station that fails to transmit broadcast signals for any consecutive 12 month period expires as a matter of law at the end of that period, notwithstanding any provision, terms or condition of the license to the contrary.

Thus, if the preliminary injunction is granted and the translators shut down now, and they were off the air for 12 consecutive months (which is virtually certain), all the licenses would expire as a matter of law without the ability of the Court, the FCC or anyone else to reinstate them after that period of time. In addition, such an expiration moots the appeal since the corpus of the appeal would no longer exist.

In accord with the foregoing authority and the general policy of the FCC, which has not been extended to PCI, PCI must be allowed to continue to operate

pending the resolution of the appellate proceedings before the D.C. Circuit.

II. THE FCC DECISION HAS NOT BEEN DETERMINED TO BE FINAL.

If the FCC decision is not final, then the licenses continue in effect pursuant to 47 C.F.R. §1.62(a)(1), which provides:

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

Whether the FCC decision is a "final determination" is a matter to be determined by the D.C. Circuit and not by this Court. The D.C. Circuit has ordered briefing on this issue, and has not yet decided it.

A January 7, 2002, Order of the D.C. Circuit (Appendix B) refers a motion to remand the case to the merits panel for resolution. Among other things, the parties are directed to brief the effect on the Court's jurisdiction by the ongoing agency proceedings mandated by the FCC May 18, 2001, order. More specifically, the parties are directed to address the effect of any proceedings pending before the FCC on the Court's jurisdiction over appellant's challenge to the FCC's refusal to renew the licenses of the non-Seward stations. If the May 18, 2001, FCC order is not a final order, as the Court of Appeals seems to

indicate, then 47 U.S.C. §307(c)(3) and 47 C.F.R. §1.62(a)(1) clearly provide that PCI's licenses continue in effect.

Accordingly, until there is a decision by the D.C. Circuit on whether the FCC decision is final, PCI's translator licenses continue in effect, and PCI cannot be forced to suspend translator operations.

III. PCI IS ENTITLED TO THE PROTECTIONS OF 5 U.S.C. §558(c) IN THESE PROCEEDINGS.

47 U.S.C. 312 deals with revocation proceedings. 47 U.S.C. §312(c), with respect to cease and desist orders, provides:

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

The panel did not reach the application of this statute in its opinion. (Opinion, page 6051), except to state that the decision had become final and the licenses expired under 5 U.S.C. §558(c).

This case did deal with license revocations. The data base for the FCC, as of May 19, 2001, reflected that PCI had licenses with terms in effect until February 1, 2006. When these terms were cut short, that is a license revocation.

As pointed out in Argument II above, however, the decision had not become final. As pointed out in Argument I above, the licenses continued in effect

through appeal. Accordingly, PCI is entitled to the protections of 5 U.S.C. §558 (which incorporates §556 and 557) prior to the revocation of PCI's licenses.

IV. THE DISTRICT COURT LACKS JURISDICTION TO DECIDE THE "REGULARLY MADE" ISSUE.

Once the notice of appeal of the FCC decision has been filed with the D.C. Circuit, as has been done in this case, 47 U.S.C. §402(c) applies, which specifically provides:

... Upon filing of such [notice of appeal] the court [D.C. Circuit] shall have jurisdiction of the proceedings and of the questions determined therein...

One of the questions "determined therein" was a determination by the FCC that it did not need to afford hearings to PCI prior to dismissing its license renewal proceedings and ordering it to shut down its translators. This decision is one of those presently pending on appeal before the D.C. Circuit. In accord with 47 U.S.C. §402(c), the D.C. Circuit has jurisdiction to decide this question.

However, the same question applies to the "regularly made" determination which must be made by the Alaska District Court under 47 U.S.C. §401(b). If an order was entered in a manner which deprives the applicant of procedural due process - such as lack of a required hearing - it cannot have been "regularly made." However, the District Court cannot decide the "procedural due process, lack of hearing" issue because only the D.C. Circuit has the jurisdiction to make

that determination.

The only appropriate result here is to dismiss the Alaska District Court proceedings, or stay these proceedings until the D.C. Circuit rules on the presently pending appeals and decides the due process issues, which in turn determine whether the order was regularly made. If the District Court is requested to take action, the United States should be required to file a motion for limited remand to the D.C. Circuit to authorize any requested action to be taken by the District Court.

IV. PCI WAS ENTITLED TO A DISTRICT COURT HEARING.

PCI was not allowed a hearing on "regularly made and duly served" as required by 47 U.S.C. §401(b). The specific language of 47 U.S.C. §401(b), requires a hearing and allows the District Court no discretion to refuse to provide such a hearing. A hearing should have been allowed based on the clear statutory language alone.

CONCLUSION

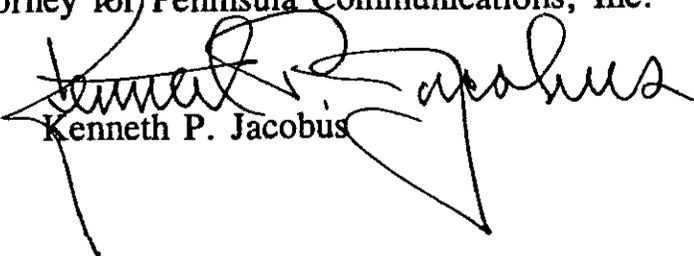
These petitions for rehearing should be granted, and the preliminary injunction entered by the District Court should be vacated or stayed, and the case either dismissed or proceedings stayed pending the completion of the appeal presently pending before the Court of Appeals for the D.C. Circuit and the

pending and future FCC proceedings involving this matter. In the interim period, the status quo should be maintained by allowing the translators to continue to operate and serve their communities.

DATED this 5th day of June, 2002.

KENNETH P. JACOBUS, P.C.
Attorney for Peninsula Communications, Inc.

By


Kenneth P. Jacobus

PETITION FORMAT CERTIFICATION

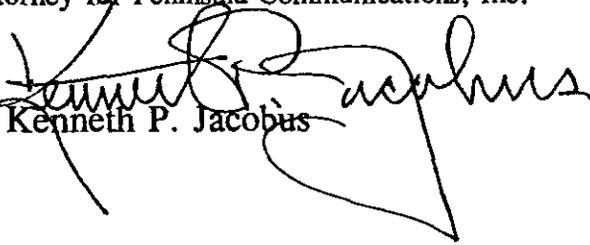
Pursuant to Ninth Circuit Rule 32(e)(4), I hereby certify that the reply brief of defendant/appellant is proportionately spaced, prepared in a base font of 14 point CG Times, and consists of 12 textual pages.

DATED this 5th day of June, 2002.

KENNETH P. JACOBUS, P.C.

Attorney for Peninsula Communications, Inc.

By


Kenneth P. Jacobus

CERTIFICATE OF SERVICE

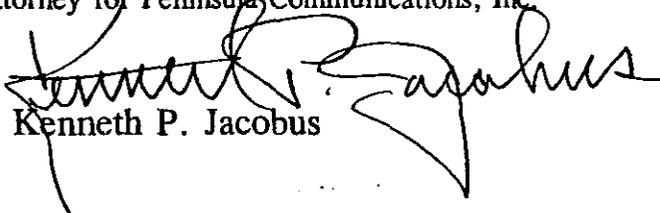
I hereby certify that the two bound copies of the Petition for Panel Rehearing and Rehearing En Banc of Appellant of Peninsula Communications, Inc. were mailed to each of the following on the 5th day of June, 2002,:

Richard Pomeroy
Office of the United States Attorney
222 West 7th Avenue, Room 253
Anchorage AK 99513-7567

Gregory Christopher
Federal Communications Commission
Office of the General Counsel
445 - 12th Street N.W.
Washington DC 20554

DATED this 5th day of June, 2002.

KENNETH P. JACOBUS, P.C.
Attorney for Peninsula Communications, Inc.

By 
Kenneth P. Jacobus

APPENDIX A

**FCC MEMORANDUM OPINION AND ORDER,
MAY 18, 2001**

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

In re Peninsula Communications, Inc.)	
)	
Applications for Renewal of License for FM)	
Translator Stations)	
)	
K272DG and K285EG, Seward, Alaska;)	File Nos. BRFT-951124UT, YU, YW, ZE
K285EF, Kenai, Alaska;)	through ZH, ZJ, ZK; BRFT-970930US, YA
K283AB, Kenai/Soldotna, Alaska;)	through YH
K257DB, Anchor Point, Alaska;)	
K265CK, Kachemak City, Alaska;)	Facility ID Nos.: 52161, 52155, 52151,
K272CN, Homer, Alaska; and)	52164, 52160, 52158, 52162, 52154 and
K274AB and K285AA, Kodiak, Alaska)	52148
)	
And)	
)	
Applications to Assign the Licenses of)	
)	
K272DG and K285EG, Seward, Alaska;)	
K285EF, Kenai, Alaska;)	File Nos. BALFT-970701TR through TZ
K283AB, Kenai/Soldotna, Alaska;)	
K257DB, Anchor Point, Alaska;)	
K265CK, Kachemak City, Alaska;)	
K272CN, Homer, Alaska; and)	
K274AB and K285AA, Kodiak, Alaska)	
)	
From Peninsula Communications, Inc. to)	
Coastal Broadcast Communications, Inc.)	

MEMORANDUM OPINION AND ORDER AND ORDER TO SHOW CAUSE

Adopted: May 10, 2001

Released: May 18, 2001

By the Commission:

1. In this Order, we dismiss as untimely a pleading styled "Rejection of Conditional License Renewal and Assignment of License Grants," filed on March 15, 2000, by Peninsula Communications, Inc. ("Peninsula"). We also, on our own motion: (1) rescind the 1995 and 1997 conditional grants of the above-captioned renewal applications; (2) rescind the conditional grants of the above-captioned assignment applications; (3) dismiss the 1995 and 1997 renewal applications, cancel the call signs and terminate the operating authority for the translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak; (4) grant unconditionally the above-captioned renewals for translator stations K272DG and K285EG, Seward; and (5) order Peninsula pursuant to section 316 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 316, to show cause why its licenses for translators K272DG and K285EG, Seward, should not

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be modified.¹ Our reasons follow.

I. Background

2. This case primarily involves our eligibility and signal delivery requirements for FM translators, which appear in 47 C.F.R. §§ 74.1231(b), 74.1232(d). Briefly, those provisions provide that other-area or non-fill-in translators may only retransmit primary FM station signals received by the translator directly over-the-air and that authorization for an "other-area" or "non-fill-in" translator will not be granted to persons interested in or connected with the commercial "primary FM station."² These rules became effective on June 1, 1991, with pre-existing translators required to comply no later than June 1, 1994.³ As the Commission explained in establishing these rules, translators are intended to provide "supplementary service to areas in which direct reception of FM radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers," and the governing rules are meant "to ensure that the translator service does not adversely affect the operation of FM radio broadcast operations." *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, *supra* note 3, 8 FCC Rcd at 5093.

3. Peninsula is the licensee and assignor of the captioned FM translator stations K272DG and K285EG Seward; K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and 285AA, Kodiak, Alaska. Peninsula's nine translator stations are all non-fill-in stations that rebroadcast primary stations licensed to Peninsula.⁴ The Seward translators, K272DG and K285EG, have received and continue to receive their primary stations' signals for rebroadcast by methods other than directly over-the-air. In addition, as explained herein, the Seward translators are operating in conformance with our rules pursuant to waivers, while the seven remaining translators are operating in violation of our translator rules and, except for the Kodiak translators,⁵ have been since at least June 1, 1994.

¹ As explained herein, we believe the Seward translators currently have the benefit of waivers of sections 73.1231(b) and 73.1232(d) of the Commission's rules, which we believe can best be addressed by following the procedures set forth in section 316 of the Act and section 1.87 of the Commission's rules.

² An "other-area" or "non-fill-in" translator is one whose coverage contour extends beyond the protected service contour of its primary station. See 47 C.F.R. §74.1201(h) and (i). A "primary" FM station is the station whose signal a translator retransmits. 47 C.F.R. §74.1201(d).

³ See *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. denied*, 8 FCC Rcd 5093 (1993).

⁴ The Kodiak translators ceased rebroadcasting Peninsula's KPEN-FM, Soldotna and KWVV-FM, Homer, Alaska on November 12, 1997, and remained silent between that date and October 29, 1998. On October 29, 1998, the Kodiak translators began rebroadcasting the signal of a noncommercial FM translator in Kodiak in accordance with our translator rules. See *December 1998 MO&O*, 13 FCC Rcd at 23998 n. 13. However, according to a "Request for Investigation," filed February 12, 2001, by Kodiak Island Broadcasting Company, Inc. ("KIB"), licensee of stations KVOK and KRXX(FM), Kodiak, the Kodiak translators again began to rebroadcast Peninsula's stations KPEN-FM and KWVV-FM in late January 2001. KSRM, Inc., licensee of stations KSRM, Soldotna, and KWHQ(FM), Kenai, filed comments in support of KIB's request on February 15, 2001. On March 15, 2001, Peninsula responded to KIB's "Request for Investigation" and reported that the Kodiak translators had recently recommenced the rebroadcast of stations KPEN-FM and KWVV-FM.

⁵ See footnote 4, *supra*.

4. On November 24, 1995, Peninsula filed license renewal applications for the nine translator stations ("1995 renewal applications"). On September 11, 1996, the staff, in addressing petitions to deny filed against six of the nine 1995 renewal applications,⁶ determined that Peninsula had operated the non-Seward translator stations in violation of our translator rules' ownership restrictions since June 1, 1994. See 47 C.F.R. § 74.1232(d). The staff also concluded that, although the Seward translator stations had previously received waivers of this rule, continued waivers were not warranted. Finally, the staff deferred action on the 1995 renewal applications for a period of 60 days to allow Peninsula to file assignment applications for the nine translators in order to come into compliance with 47 C.F.R. § 74.1232(d). See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B4-AJS (Chief, Audio Services Division, Mass Media Bureau, September 11, 1996) ("September 1996 letter"). Ultimately, acceptable assignment applications were filed on July 1, 1997.⁷

5. On November 6, 1997, the staff granted the applications to assign the licenses for all nine translators. So that the assignments could go forward, the staff also granted all nine 1995 renewal applications, conditioned upon consummation of the authorized assignments. Finally, the staff conditioned consummation of the assignments on grant of the recently-filed 1997 renewal applications. See *Letter to Jeffrey D. Southmayd, Esq.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, November 6, 1997) ("November 1997 staff decision"). The November 1997 staff decision stated that failure to meet the divestiture condition would render grant of the 1995 renewal applications null and void. Peninsula did not seek reconsideration or review of the November 1997 staff decision. However, Cobb Communications, Inc., Glacier Communications, Inc., KSRM, Inc., and King Broadcasters, Inc. (collectively referred to as "Petitioners") filed both a petition for reconsideration and an application for review of the November 1997 staff decision. As was the case with respect to the 1995 renewal applications, Petitioners did not challenge the license renewals or assignments for K257DB, Anchor Point; K265CK, Kachemak City; or K272CN, Homer.

6. In December 1998, the Commission dismissed and denied, respectively, Petitioners' petition for reconsideration and their application for review. *Peninsula Communications, Inc.*, 13 FCC Rcd 23992 (1998) ("December 1998 MO&O"). Essentially, Petitioners had argued that the staff should have revoked Peninsula's licenses because of the rule violations and that the staff erred in concluding instead that Peninsula could sell the subject translator stations. In our decision, we noted that, in the absence of an unresolved basic character qualification issue, "there can be no doubt as to the Commission's authority to cure or remedy [the violation of the ownership restrictions] by granting the renewal applications conditioned on divestiture of the translators." *December 1998 MO&O*, 13 FCC Rcd at 23996. In the December 1998 MO&O, we also granted Peninsula's 1997 renewal applications,⁸

⁶ The six challenged translator stations were K272DG and K285EG, Seward; K285EF, Kenai; K283AB, Kenai/Soldotna; and K274AB and K285AA, Kodiak.

⁷ Peninsula and Coastal Broadcast Communications, Inc. ("Coastal") originally filed applications to assign the nine translator stations on November 14, 1996. Those applications were dismissed as patently not in accordance with the Commission's rules. See *Letter to Jeffrey D. Southmayd, Esq., et. al.*, Ref. No. 1800B3-BSH (Chief, Audio Services Division, Mass Media Bureau, June 17, 1997) ("June 1997 Staff Decision"). The June 1997 Staff Decision afforded the parties ten business days to file assignment applications that would fully comply with the Commission's rules. Peninsula and Coastal then filed the above captioned assignment applications.

⁸ The brevity of the time period between the filing of the 1995 and 1997 renewal applications was the result of the Commission's decision to modify FM translator license terms to run concurrently with the terms of (continued....)

conditioned on consummation of the authorized assignments, and denied requests for waiver of 47 C.F.R. § 74.1231(b), the over-the-air delivery restrictions, filed by Coastal for the Kodiak translators. However, with respect to the Seward translators, we determined that discontinuation of the previously granted waivers of 47 C.F.R. § 74.1231(b) would require termination of the operations of those translators and would not serve the public interest at that time since the translators provided Seward's only FM service. We noted that a construction permit had been issued to William M. Holzheimer, one of the principals of Glacier Communications, Inc., for a new FM station in Seward. In regard thereto, we stated that, if and when that full service FM station commenced operation, we "may consider whether the circumstances under which the waivers were granted have so changed as to warrant termination of the Seward translator operations." See *December 1998 MO&O*, 13 FCC Rcd at 23997-99.

7. Peninsula and Glacier sought reconsideration of the *December 1998 MO&O*. Peninsula disputed the conditional grants of the 1995 and 1997 renewal applications. It also contested the determination that the seven subject translators other than the ones in Seward had been operating in violation of 47 C.F.R. § 74.1232(d) since June 1, 1994 and the determination that continued waiver of 47 C.F.R. § 74.1232(d) was not warranted for the two Seward translators. In addition, Peninsula, but not Coastal, requested reconsideration of the denial of requests for waivers of 47 C.F.R. § 74.1231(b) for the Kodiak translators. Finally, Peninsula objected to our statement that we would consider whether to terminate the Seward translators' 47 C.F.R. § 74.1231(b) waivers if and when an unbuilt, full service FM station authorized in Seward commenced operations. Glacier argued that Peninsula's waivers of the over-the-air reception rule, 47 C.F.R. § 74.1231(b), should be discontinued for the Seward translators.

8. On February 14, 2000, we dismissed Peninsula's petition for reconsideration of the *December 1998 MO&O*. *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) ("*February 2000 MO&O*"). We ordered Peninsula to consummate the authorized assignments within thirty days of the decision, and we directed the staff to rescind the conditional grants of the 1995 and 1997 license renewal applications, cancel the relevant call signs and terminate the translators' operating authority if Peninsula did not comply with the divestiture requirement. *February 2000 MO&O*, 15 FCC Rcd at 3294. We also granted Mr. Holzheimer's application for a license to cover the construction permit for full power FM station KPFN(FM), Seward, Alaska and terminated the waivers of the 47 C.F.R. § 74.1231(b) signal delivery rule for the subject Seward translators effective 60 days from the release date of the order. *Id.* at 3295-96. In so doing, we took note of Glacier's argument that the Peninsula translators were taking radio revenues out of the small community of Seward, creating financial difficulties for the new FM full service station, KPFN(FM), and we concluded that permitting Peninsula to continue to deliver a distant signal to Seward would be a clear detriment to the continued viability of full service broadcast stations licensed to Seward. *Id.* On February 23, 2000, Peninsula filed with the Commission a motion to stay the effect of the *December 1998 MO&O* and the *February 2000 MO&O* pending the filing and resolution of an appeal it intended to file.⁹

9. On March 8, 2000, Peninsula filed an appeal of the Commission's *February 2000 MO&O* with the United States Court of Appeals for the District of Columbia Circuit ("Court"). That same day,

(Continued from previous page)

FM primary stations. See *In the Matter of Modifying Renewal Dates for Certain Stations Licensed under Part 74 of the Commission's Rules and Revising FCC Form 303-S, Report and Order*, 9 FCC Rcd 6504 (1994).

⁹ In a supplement to that motion, filed on March 3, 2000, Peninsula attached a letter from Coastal. That letter made plain that Coastal was no longer willing to buy Peninsula's translators for the price agreed upon in 1996.

Peninsula filed an Emergency Motion for Stay of the *February 2000 MO&O* with the Court arguing, *inter alla*, that, pursuant to 47 U.S.C. § 309(k), the Commission was required to grant its renewal applications unconditionally and that its operating authority could be terminated only after a hearing pursuant to 47 U.S.C. § 312.¹⁰ On March 14, 2000, the Court denied Peninsula's Emergency Motion for Stay. On March 15, 2000, Peninsula filed with the Commission the pleading now before us, a "Rejection of Conditional License Renewal and Assignment of License Grants." By order dated July 11, 2000, the Court dismissed Peninsula's appeal without prejudice to refiling following the Commission's resolution of the "Rejection of Conditional License Renewal and Assignment of License Grants."

10. Peninsula's "Rejection of Conditional License Renewal and Assignment of License Grants" is premised on 47 C.F.R. § 1.110. Section 1.110 provides that, "[w]here the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, ... the action of the Commission shall be considered as a grant of such application unless the applicant shall within 30 days from the date on which such grant is made... file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing." In its pleading, Peninsula rejects the action of the Commission granting Peninsula's 1995 and 1997 license renewal applications conditioned on divestiture of the translator licenses and "upon the other conditions contained in the orders." Peninsula also states that it rejects the staff's grant of the 1997 assignment applications "subject to the conditions modifying the licenses for the two Seward stations, and the other conditions placed thereon." Peninsula asserts that, pursuant to 47 C.F.R. § 1.110, the Commission must now vacate its original action on the applications and set the applications for hearing. Peninsula states that it considers the Commission's actions in the *December 1998 MO&O* and *February 2000 MO&O* "vacated *ab initio* as of this date, null, void, and of no further force and effect, and requiring no further action by Peninsula in accordance therewith." Peninsula continues to operate the subject nine translator stations.

II. Discussion

11. After carefully considering all the circumstances, we believe that Peninsula's invocation of 47 C.F.R. § 1.110 is untimely and warrants dismissal. Peninsula's "Rejection of Conditional License Renewal and Assignment of License Grants" was not filed until more than two years after conditional grants of the 1995 renewal applications and 1997 assignment applications, which occurred as a result of the *November 1997 staff decision*. Peninsula did not seek reconsideration of the *November 1997 staff decision*. Rather, Peninsula actually accepted and endorsed the November 1997 conditional grants of the 1995 renewal applications observing that the conditional grants were "fair and consistent with the facts and existing legal precedent for approving such applications." See Peninsula's December 30, 1997 Opposition to Application for Review, at page 8. 47 C.F.R. § 1.110 "does not allow applicants first to

¹⁰ 47 U.S.C. § 309(k)(1) sets forth the standards the Commission must reference in determining whether to renew a license for a broadcast station. Section 309(k)(2) of the Act provides that if the licensee fails to meet one of the renewal standards, the Commission may grant the application subject to appropriate terms and conditions. That section, in conjunction with section 309(k)(3), alternatively provides that the Commission may deny the renewal application after a hearing. As our discussion in paragraph 13, *infra*, makes clear, we believe that the staff's imposition of a divestiture condition upon Peninsula was necessary to correct the serious, ongoing violations of our translator rules with respect to the translators in Anchor Point, Kachemak City, Homer, Kenai, and Kodiak. Finally, inasmuch as we are granting unconditional renewals for the Seward translators, Peninsula's section 309(k) argument relative to those licenses is now moot.

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accept a partial grant, yet later to seek reconsideration of its conditions." *Tribune Company v. FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998), citing *Central Television, Inc. v. FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987). An applicant must file a written request rejecting a conditional grant within 30 days from the date on which the conditional grant is made; otherwise, the action of the Commission shall be considered as a grant of the application and that grant is not subject to appeal by the applicant. See *Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 81 (1996), citing *Central Television, Inc. v. FCC*, 834 F.2d 186, 190-91 (D.C. Cir. 1987). Accordingly, we find the "Rejection of Conditional License Renewal and Assignment of License Grants" at issue here to be untimely, and it is hereby dismissed.¹¹ See 47 C.F.R. § 1.110; see also *Capital Telephone Co. v. FCC*, 498 F.2d 734, 740 (1974).

12. In light of the dismissal of Peninsula's belated "Rejection of Conditional License Renewal and Assignment of License Grants," we must now determine the fate of Peninsula's translators. In this regard, the failure to consummate the assignments, coupled with Coastal's apparent unwillingness to go forward with the assignments at any time in the foreseeable future, compels the conclusion that the conditions attached to the grants of Peninsula's 1995 and 1997 renewals were not (and likely will never be) met. Consistent with the *February 2000 MO&O*, we could rescind the 1995 and 1997 renewal grants and order Peninsula's translators off the air immediately. However, we believe our ultimate decision should account for the different factual circumstances attending the different sets of translators. Accordingly, on our own motion, we are modifying our *February 2000 MO&O* as set forth in this Order.¹²

13. K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; K285EF, Kenai; K283AB, Kenai/Soldotna; and K274AB and K285AA, Kodiak. The staff correctly concluded in 1996 that Peninsula had been operating these facilities contrary to the requirements of 47 C.F.R. § 74.1232(d) since June 1, 1994. See *September 1996 letter*. To rectify this situation, the *November 1997 staff decision* expressly conditioned grant of the translator stations' 1995 renewal applications on consummation of their assignment to Coastal.¹³ As noted, consummation of the assignments has not occurred and will not occur. Thus, Peninsula has not fulfilled the condition notwithstanding our explicit warning that its failure to divest would result in rescission of the grants of the 1995 and 1997 renewal applications. See *February 2000 MO&O*, 15 FCC Red at 3294. Accordingly, as to these stations, we rescind the conditional grants of the 1995 and 1997 renewal applications, rescind the 1997 conditional assignment grants, dismiss the 1995 renewal applications and dismiss, as moot, the 1997 assignment applications and 1997 renewal applications.¹⁴ *P&R Termer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (termination of license for failure to meet license condition did not require hearing). Finally, inasmuch as Peninsula's authority to

¹¹ In light of our disposition of the 1995 renewal applications, we need not address the effect of Peninsula's rejection with respect to the 1997 renewal applications. See paragraphs 13-14, *infra*.

¹² In light of our decision to modify our prior order, we do not believe enforcement action with respect to our prior order is warranted. We instruct the staff to move quickly and strongly, however, to recommend or take appropriate enforcement action if there is any non-compliance with the provisions of this order.

¹³ Although the Petitioners filed a petition for reconsideration and application for review of the *November 1997 staff decision* with respect to six of the nine subject translators, Peninsula did not timely contest the *November 1997 staff decision*.

¹⁴ As consummation of the authorized assignments has not occurred and will not occur, we also rescind the 1997 conditional assignment grants for stations K272DG and K285EG, Seward, and we dismiss, as moot, the 1997 assignment applications for those Seward translator stations.

operate these translators has expired, Peninsula must cease operations by 12:00 midnight the day after release of this Order. Further operations by Peninsula after this time may subject it to serious sanctions, including but not limited to forfeitures under section 503(b) of the Act. See also 47 U.S.C. §§ 401, 501 and 502.

14. K272DG and K285EG, Seward ("Seward translators"). The procedural posture of the Seward translators is akin to that of the other seven translators. However, there is one significant difference. In this regard, the staff had explicitly granted Peninsula waivers of 47 C.F.R. §§ 74.1231(b) and 74.1232(d), waivers that we declined to rescind in our *December 1998 MO&O* because of concerns about loss of FM programming to the public. At the same time, however, we also indicated that commencement of operations by a new full service FM station in Seward would justify review of the situation to determine whether the waivers should continue. In our *February 2000 MO&O*, we ordered termination of the Seward waivers within 60 days of the release of that order in light of the commencement of operations of KPFN(FM), Seward. Peninsula has challenged this result in Court and we believe that section 316 of the Act affords the most direct and expedient means of resolving the matter.¹⁵ Accordingly, we will grant unconditionally Peninsula's 1995 and 1997 renewals for the Seward translators. In addition, pursuant to section 316 of the Act, we will order Peninsula to show cause why its Seward translators' licenses should not be modified to discontinue the previously granted waivers of 47 C.F.R. §§ 74.1231(b) and 74.1232(d). Should Peninsula protest the proposed order of modification, we intend to rule on the matter expeditiously.¹⁶ If Peninsula's licenses are modified,¹⁷ we expect it to operate the translators in accordance with those authorizations, and, if it is unable to do so, to terminate their operation immediately.

III. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that Peninsula Communications, Inc.'s "Rejection of Conditional License Renewal and Assignment of License Grants" IS DISMISSED.

16. IT IS FURTHER ORDERED that the conditional grants of the 1995 and 1997 renewal applications filed by Peninsula Communications, Inc. for translator stations K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska; K272CN, Homer, Alaska; K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; K274AB and K285AA, Kodiak, Alaska; and K272DG and K285EG, Seward, Alaska, ARE RESCINDED.

17. IT IS FURTHER ORDERED that the conditional grants of the 1997 applications to assign the licenses for translator stations K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska;

¹⁵ Section 316 of the Act allows us to modify a license following notification to the licensee and according the licensee 30 days within which to protest the proposed order of modification. See also 47 C.F.R. § 1.87.

¹⁶ Any order modifying Peninsula's licenses will be issued by the Commission. If there are substantial and material questions of fact requiring a hearing pursuant to section 316(a)(3) of the Act, the Mass Media Bureau shall designate the matter for hearing. The staff may also decide not to modify the licenses on delegated authority.

¹⁷ We are aware that termination of the waivers of the over-the-air delivery restrictions for the Seward translators may result in termination of service to a number of Alaskan citizens who claim that the service provided by these translators is critical and that the full-service AM and FM stations licensed to Seward will not be adequate substitutes. See Peninsula's March 6, 2000, Statement for the Record with attached letters.

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K272CN, Homer, Alaska; K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; K274AB and K285AA, Kodiak, Alaska; and K272DG and K285EG, Seward, Alaska, from Peninsula Communications, Inc. to Coastal Broadcast Communications, Inc. ARE RESCINDED.

18. IT IS FURTHER ORDERED that the 1995 and 1997 renewal applications filed by Peninsula Communications, Inc. for translator stations K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska; K272CN, Homer, Alaska; K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; and K274AB and K285AA, Kodiak, Alaska, ARE DISMISSED.

19. IT IS FURTHER ORDERED that the 1997 applications to assign the licenses for translator stations K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska; K272CN, Homer, Alaska; K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; and K274AB and K285AA, Kodiak, Alaska, from Peninsula Communications, Inc. to Coastal Broadcast Communications, Inc. ARE DISMISSED.

20. IT IS FURTHER ORDERED that call signs for translator stations K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska; K272CN, Homer, Alaska; K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; and K274AB and K285AA, Kodiak, Alaska, ARE DELETED.

21. IT IS FURTHER ORDERED that Peninsula Communications, Inc. SHALL TERMINATE OPERATIONS for translator stations K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska; K272CN, Homer, Alaska; K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; and K274AB and K285AA, Kodiak, Alaska, effective at 12:00 midnight on the day after release of this Order.

22. IT IS FURTHER ORDERED that the 1995 and 1997 renewal applications filed by Peninsula Communications, Inc. for translator stations K272DG and K285EG, Seward, Alaska, ARE GRANTED UNCONDITIONALLY.

23. IT IS FURTHER ORDERED that the 1997 applications to assign the licenses for translator stations K272DG and K285EG, Seward, Alaska, from Peninsula Communications, Inc. to Coastal Broadcast Communications, Inc. ARE DISMISSED.

24. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 316(a) and 47 C.F.R. § 1.87, Peninsula Communications, Inc., IS DIRECTED TO SHOW CAUSE why the licenses for translator stations K272DG and K285EG, Seward, Alaska, SHOULD NOT BE MODIFIED:

[1.] To terminate waivers of 47 C.F.R. § 74.1231(b); and

[2.] To terminate waivers of 47 C.F.R. § 74.1232(d).

25. Pursuant to 47 C.F.R. § 1.87, Peninsula Communications, Inc. may, not later than 30 days from the release of this Order, file a written protest showing with particularity why the licenses for translator stations K272DG and K285EG, Seward, Alaska, should not be modified as proposed. Any protest will be considered fully before the Commission decides whether to modify the subject licenses. If a hearing is deemed necessary because the protest raises a substantial and material question of fact, the Mass Media Bureau shall designate such hearing in a subsequent order. If no protest is filed by the date referenced above, Peninsula Communications, Inc. will be deemed to have consented to the modification as proposed and the Commission will issue a final order to that effect.

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26. IT IS FURTHER ORDERED that the Mass Media Bureau SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Memorandum Opinion and Order and Order to Show Cause to:

Peninsula Communications, Inc.
c/o Jeffrey D. Southmayd, Esquire
Southmayd & Miller
1220 19th Street, N.W., Suite 400
Washington, D.C. 20036

Peninsula Communications, Inc.
Post Office Box 109
Homer, Alaska 99603

Chester P. Coleman and Phoenix Broadcasting, Inc.¹⁸
c/o David Tillotson, Esquire
4606 Charleston Terrace, N.W.
Washington, D.C. 20007

Kodiak Island Broadcasting Company, Inc.
c/o Henry A. Solomon, Esquire
Garvey, Schubert & Barer
1000 Potomac Street, N.W., 5th Floor
Washington, D.C. 20007

KSRM, Inc.
c/o Peter Gutmann, Esquire
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006

FEDERAL COMMUNICATIONS COMMISSION

Magalie Román Salas
Secretary

¹⁸ Mr. Coleman and Phoenix are successors in interest to King Broadcasters, Inc. and Glacier Communications, Inc., two of the Petitioners first identified in paragraph 5, *supra*.

APPENDIX B
COURT OF APPEALS ORDER,
JANUARY 7, 2002

United States Court of Appeals PCI EXHIBIT I-C-47
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1273

September Term, 2001

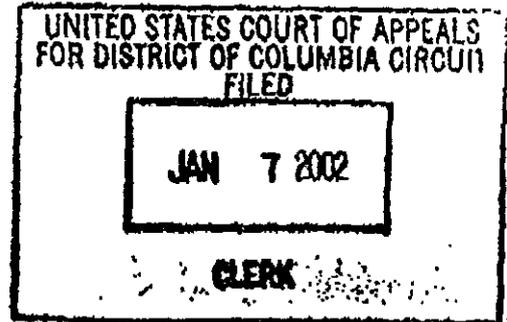
Filed On:

Peninsula Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

Phoenix Broadcasting, Inc., et al.,
Intervenors



BEFORE: Edwards, Sentelle, and Henderson, Circuit Judges

ORDER

Upon consideration of the motions to govern further proceedings and the motion to remand case, it is

ORDERED that the motion to remand case be referred to the merits panel to which this petition is assigned. The parties are directed to include in their briefs the arguments raised in the motion rather than incorporate those arguments by reference. It is

FURTHER ORDERED, on the court's own motion, that the parties, while not otherwise limited, also address in their briefs the effect on the court's jurisdiction of the ongoing agency proceedings required by the Federal Communication Commission's ("FCC") May 18, 2001 order. Specifically, the parties are directed to address the effect of any proceedings pending before the FCC on this court's jurisdiction over appellant's challenge to the FCC's refusal to renew the licenses of the non-Seward stations.

The parties will be notified by separate order of the briefing schedule, oral argument date, and composition of the merits panel.

Per Curlam