

ATTACHMENT 1

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-970930U5, 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

be modified¹ 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, 1994³ 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 alia*, 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.

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 Rcd 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.

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 Crty, 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.

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*.

ATTACHMENT 2

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

In the Matter of)	
)	
Peninsula Communications, Inc.)	File No. EB 01-IH-0403
)	NAL/Acct No 200132080060
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)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: August 23, 2001

Released: August 29, 2001

By the Commission:

1. In this Notice of Apparent Liability for Forfeiture and Order (“NAL”), we find that Peninsula Communications, Inc. (“Peninsula”) has apparently violated Section 301 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C § 301. The apparent violations arise from continued operation of translator stations K285EF, Kenai; K283AB, Kenai/Soldotna, K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak subsequent to our order to terminate such operations. *See Peninsula Communications, Inc.*, FCC 01-159, released May 18, 2001 (“*May 2001 MO&O*”).¹ We conclude that Peninsula is apparently liable for a forfeiture in the amount of one hundred forty thousand dollars (\$140,000) We also order Peninsula to submit an affidavit informing us whether Peninsula has ceased operating the above-captioned translators and whether it intends to operate those translators at any time in the future absent authorization to do so. In this regard, we note that continued unauthorized operation may lead to an order to show cause to revoke Peninsula’s other Commission licenses

I. BACKGROUND

2. This case involves our eligibility and licensing requirements for FM translators, which appear in 47 C.F.R § 74 1232(d). Briefly, that subsection provides that authorization for an “other-area” or “non-fill-in” translator will not be granted to persons interested in or connected with the commercial

¹ That order also dealt with translators licensed to Peninsula, which are in Seward, Alaska. The operation of those translators is not pertinent to this NAL, and no further reference will be made to them

“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 was the licensee of the captioned FM translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer, and K274AB and 285AA, Kodiak, Alaska. All of those translator stations were non-fill-in stations that rebroadcast primary stations licensed to Peninsula. All of the translators, except the Kodiak translators, have been operated by Peninsula in violation of 47 C.F.R. § 74.1232(d) since at least June 1, 1994.⁴

4 In September 1996, the staff, in addressing petitions to deny filed against some of the translators’ 1995 renewal applications,⁵ determined that Peninsula was operating the translator stations in violation of our translator rules’ ownership restrictions. *See* 47 C.F.R. § 74.1232(d). Nevertheless, the staff deferred action on the 1995 renewal applications for a period of 60 days to allow Peninsula to file assignment applications 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.⁶

5 On November 6, 1997, the staff granted the assignment applications, as well as Peninsula’s 1995 renewal applications, conditioned upon consummation of the authorized assignments. In addition, the staff conditioned consummation of the assignments on grant of the recently-filed 1997 renewal

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 Peninsula Communications, Inc.*, 13 FCC Rcd 23992, 23998 n. 13 (1998) (“December 1998 MO&O”). However, in January 2001, Peninsula recommenced the rebroadcast of stations KPEN-FM and KWVV-FM in violation of 47 C.F.R. § 74.1232(d). *See May 2001 MO&O* at p. 2, n. 4.

⁵ The challenged translator stations included K285EF, Kenai; K283AB, Kenai/Soldotna; and K274AB and K285AA, Kodiak.

⁶ Peninsula and Coastal Broadcast Communications, Inc. (“Coastal”) originally filed applications to assign the 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 Peninsula and Coastal ten business days to file assignment applications that would fully comply with the Commission’s rules. Peninsula and Coastal did so on July 1, 1997.

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, other entities (collectively referred to as “Petitioners”) filed both a petition for reconsideration and an application for review of the *November 1997 staff decision*

6 In December 1998, the Commission dismissed and denied, respectively, Petitioners’ petition for reconsideration and their application for review. See *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,⁷ 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.⁸

7. Peninsula and Glacier Communications, Inc. sought reconsideration of the *December 1998 MO&O*. Peninsula disputed, for the first time, the conditional grants of the 1995 and 1997 renewal applications and the determination that the seven subject translators had been operating in violation of 47 C.F.R. § 74.1232(d) since June 1, 1994. 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.

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, 3296. 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. 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, Peninsula filed an Emergency Motion for Stay of the *February 2000 MO&O* with the Court. On March 14, 2000, the Court denied Peninsula’s Emergency Motion for Stay. The next day Peninsula filed with the Commission a pleading styled “Rejection of Conditional License Renewal and Assignment of

⁷ 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 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)

⁸ 47 C.F.R. § 74.1231(b) provides that other-area or non-fill-in translators may only retransmit primary FM station signals received by the translator directly over-the-air.

License Grants” (“Rejection of Conditional Grants”) By order dated July 11, 2000, the Court dismissed Peninsula’s appeal without prejudice to refile following the Commission’s resolution of the “Rejection of Conditional Grants.”

10. In our *May 2001 MO&O*, we dismissed as untimely Peninsula’s “Rejection of Conditional Grants.” In addition, we rescinded the 1995 and 1997 conditional grants of renewal, rescinded the conditional grants of assignment; dismissed the 1995 and 1997 renewal applications; dismissed the 1997 assignment applications, canceled the call signs and terminated Peninsula’s operating authority for the seven captioned translator stations. In this regard, we ordered Peninsula to terminate operations for the translator stations effective at 12 00 midnight on the day after release of that order, and we warned Peninsula that further operations by it after that time may subject it to serious sanctions, including but not limited to forfeitures.⁹ Thus, in order to comply with our *May 2001 MO&O*, Peninsula was obligated to cease operations by 12:00 midnight on May 19, 2001.

11. Commission records reflect that Peninsula and its counsel were served with our *May 2001 MO&O* on May 21, 2001, and that Peninsula itself was served with the *May 2001 MO&O* no later than May 30, 2001. Nonetheless, information provided to the Commission by our field personnel in Alaska and by competitors indicates that Peninsula has not shut down any of the translators and is continuing to broadcast the signals of its primary stations. In addition, Peninsula’s counsel has informed Commission staff in a telephone conversation that Peninsula has no intention of terminating its operations on the captioned translators.

II. DISCUSSION

12. Section 301 of the Act, 47 U.S.C. § 301, prohibits radio operation “except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.” As explained above, Peninsula’s licenses for the seven captioned translators were canceled as of midnight May 19. Nevertheless, Peninsula has continued to operate those stations in apparent defiance of our order to terminate such operations.

13. Section 503(b)(1) of the Act, 47 U.S.C. § 503(b)(1) provides that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or a Commission order shall be liable for a forfeiture penalty.¹⁰ In this context, the term “willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Communications Act,¹¹ while “repeatedly” means more than once.¹² The information before us clearly reflects that Peninsula has knowingly operated its translators subsequent to receipt of a direct order from us to stop. It thus appears that Peninsula’s violations with respect to unauthorized operations were not only willful but also were intentional. It further appears that each of the violations described occurred on more than one day; thus, they were repeated.

⁹ See *May 2001 MO&O* at p. 7, ¶ 13.

¹⁰ See also section 1.80(a)(1) and (2) of the Commission’s rules, 47 C.F.R. § 1.80(a)(1) and (2).

¹¹ See *Jerry Szoka*, 14 FCC Rcd 9857, 9865 (1999), *recon. denied*, 14 FCC Rcd 20147 (1999), *petition for review pending sub nom. Grid Radio and Jerry Szoka v. FCC*, No. 99-1463 (D.C. Cir. November 17, 1999), *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹² See *Hale Broadcasting Corp.*, 79 FCC 2d 169, 171 (1980).

14. In assessing a forfeiture, we take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), which include the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. The Commission's forfeiture guidelines currently establish a base amount of \$10,000 for operation without an instrument of authorization for the service.¹³ It appears that Peninsula has willfully and repeatedly operated seven stations without authorization, thereby bringing the total base amount of the forfeiture to \$70,000. In considering whether adjustments are appropriate, it further appears that Peninsula has unlawfully operated the translators following receipt of our *May 2001 MO&O*, which unequivocally ordered Peninsula to cease operations by midnight May 19, 2001. It thus appears that Peninsula's unauthorized operation has been intentional, which warrants an upward adjustment of the forfeiture amount.¹⁴ Moreover, we are not currently aware of any facts that would mitigate Peninsula's apparent violations. Accordingly, we believe that a \$140,000 forfeiture is appropriate.

15. Finally, in light of Peninsula's apparent defiance of our *May 2001 MO&O*, we hereby notify Peninsula that further violation of Section 301 of the Act and our *May 2001 MO&O* may raise serious questions about Peninsula's qualifications to be a Commission licensee. It thus may be necessary to institute further proceedings pursuant to Section 312(a) of the Act, 47 U.S.C. § 312(a), with respect to its full service radio station licenses and other translator station licenses. Such proceedings could lead to issuance of an order revoking one or more of those licenses. In this regard, we emphasize that the mere pendency of an appeal of our *May 2001 MO&O* will not suffice to avoid further enforcement action.¹⁵ To assist the Commission in making a determination whether such a proceeding should be instituted, Peninsula is ordered to file with the Commission's Secretary, with a copy to the Chief, Enforcement Bureau, an affidavit by an officer or director indicating (1) whether Peninsula has ceased operating the relevant translator stations; and (2) whether it intends to operate the relevant translator stations at any time in the future absent further Commission or court action giving it authority to do so. Such affidavit shall be filed no later than 10 days from the release of this order.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, Peninsula Communications, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of one hundred forty thousand dollars (\$140,000) for violating Section 301 of the Act, 47 U.S.C. § 301, by operating the seven captioned translator stations subsequent to midnight May 19, 2001.

17 IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules, 47

¹³ See section 1.80 of the Commission's rules, 47 C.F.R. § 1.80 (note to paragraph (b)(4)). See also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon denied*, 15 FCC Rcd 303 (1999).

¹⁴ See *MC Allen Productions*, Notice of Apparent Liability, DA 01-1166 (Enforcement Bureau May 9, 2001); *WRHC Broadcasting Corp.*, Notice of Apparent Liability, 15 FCC Rcd 5551 (Enforcement Bureau 2000) (subsequent history omitted).

¹⁵ See, e.g., 47 U.S.C. § 416 ("It shall be the duty of every person ... to observe and comply with such orders so long as the same shall remain in effect.").

C.F.R. § 1.80, within thirty days of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE, Peninsula Communications, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above.

19. The response, if any, must be mailed to the Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, 445 12th Street, S.W., Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. Requests for payment of the full amount of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE under an installment plan should be sent to Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁶

22. IT IS FURTHER ORDERED THAT, no later than 10 days after release of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER, Peninsula shall file with the Secretary of the Commission, with a copy to the Chief, Enforcement Bureau, an affidavit signed by one of its officers or directors indicating (1) whether Peninsula has ceased operating each and every one of the above-captioned translator stations; and (2) whether Peninsula intends to operate any or all of the above-captioned translator stations at any time in the future absent further Commission or court action giving it authority to do so.

23. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER shall be sent by Certified Mail Return Receipt Requested to Peninsula Communications, Inc., Post Office Box 109, Homer, Alaska 99603, with a copy to Jeffrey D. Southmayd, Esquire, Southmayd & Miller 1220 19th Street, N.W., Suite 400, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁶ See 47 C.F.R. § 1.1914.

ATTACHMENT 3

**DECLARATION OF DAVID F. BECKER
PRESIDENT, PENINSULA COMMUNICATIONS, INC.**

I, David F. Becker, do hereby submit this Declaration in response to the "NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER" (hereafter the "Notice"), file No. EB 01-IH-0403, issued by the Federal Communications Commission, Washington, D.C. on or about August 29, 2001. The Notice was issued for the purpose of notifying Peninsula of the Commission's perception that it had violated Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301. Specifically, the Commission alleges that the "...violations arise from continued operation of translator stations K285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; 272CN, Homer; and K274AB and K285AA, Kodiak, subsequent to our order to terminate such operations." The Commission proposes to fine Peninsula the sum of One Hundred and Forty Thousand Dollars (\$140,000.00) as a result of the alleged "illegal operation" of Peninsula's FM translator stations in these communities. The Notice requires Peninsula to "...submit an affidavit informing us whether Peninsula has ceased operating the above-captioned translators and whether it intends to operate those translators at any time in the future absent authorization to do so." This Declaration is submitted in response to the Commission's Notice. In summary, Peninsula believes that it is fully authorized to operate the subject FM translator stations (hereafter the "Translators") at the present time under the policies and rules of the Commission, and will continue to do so until such time as it is no longer authorized for such operation under the policies and rules of the Commission. In support of this disclosure, Peninsula respectfully submits the following for the consideration and review of the Commission.

It is undisputed that Peninsula was duly licensed to operate each of the Translators by the Commission and operated them with the full and undisputed consent and approval of the Commission until applications for the renewal of the licenses for the Translators were filed with the Commission in 1995. The basis for the present controversy between the Commission and Peninsula lies in the license renewal applications that were filed in a proper and timely manner in 1995, and subsequently re-filed in a proper and timely manner in 1997, in conformity with the Commission's rules and regulations. The subject proceeding is one involving license renewal applications for each of the Peninsula Translators. This is apparently a fact the Commission has lost sight of in issuing its Notice and suggesting that Peninsula's operation of the Translators violates the Communications Act and the Commission's rules and policies. It does not.

Section 1.62 of the Commission's Rules and Regulations, 47 C.F.R. 1.62, provides the procedures for the "Operation Pending Action on Renewal Applications" for broadcast stations. That rule provides as follows:

(a)(1) Where 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 which respect to the renewal application...

Section 73.3523(d)(2) of the Commission's Rules and Regulations, 47 C.F.R. 73.3523(d)(2), defines when a license renewal application is "pending" in the context of license renewal. That section provides:

(d)(2) An application shall be deemed to be pending before the Commission from the time an application is filed with the Commission until an order of the Commission granting or denying the application is no longer subject to reconsideration by the Commission or to review by any court.

Thus, under the Commission's broadcast license renewal rules and policy, a licensee is allowed to continue to operate its broadcast station within the context of a license renewal proceeding so long as the license renewal application remains subject to "...reconsideration by the Commission or to review by any court". This policy is effective no matter how heinous or otherwise outrageous the underlying conduct of the licensee may have been to warrant the denial of a license renewal application and/or the revocation of the license. *C.f. Contemporary Media, Inc. et. al. v. Federal Communications Commission*, 215 F.3d 187 (D.C. Cir. 2000) [licenses revoked due to licensee's sole owner and president being criminally convicted of sexually abusing children; licensee allowed to continue to operate stations through federal court appeal process].

While the Commission's Notice contains a fairly exhaustive recitation of the history of the regulatory proceeding involving the Translators, it unaccountably omits one quite important fact. The most recent orders in the Peninsula Translator proceeding, and those preceding them, are presently on review before the United States Court of Appeals for the District of Columbia Circuit. *See, Peninsula Communications, Inc. v. Federal Communications Commission*, Case No. 01-1273. The Commission is apparently aware of the pending nature of this action to review its orders in this proceeding since it has entered an appearance and is participating in the case. See Attachment A. Thus, Peninsula is at a loss to explain either the reason the Notice fails to mention the pending court proceeding, or to explain the erroneous conclusion in the Notice that it is operating the Translators that are the subject of court review "illegally."

In addition to the pending nature of the court appeal, the Translator proceeding may not be "final" at the present time in the context of the Commission's processes. On September 6, 2001, the United States Court of Appeals issued an *Order* in the *Peninsula* case, noting that the Commission's most recent decision, *Peninsula Communications, Inc.* FCC 01-159 (released May 18, 2001), required Peninsula to show cause why two of its translator licenses should not be modified. The Court raises the question whether this action by the Commission renders the entire action in the Peninsula proceeding non-final until such time as the show cause matter is finally resolved. Peninsula and the Commission have been directed to file pleadings on the matter in October.

These aspects of the Peninsula proceeding underscore the policy basis for allowing license renewal applicants to continue the operation of broadcast stations until such time as any proceedings on the matter are final and no longer subject to review. Moreover, as noted in the above-referenced rule regarding continued operation of stations during the processing of license renewal applications, the Administrative Procedure Act requires that all regulatory procedures be fully implemented and exhausted before an authorization is finally revoked and operating authority is terminated. This is crucially important in the context of broadcast licenses since the implementation of the 1996 amendments to the Communications Act of 1934, as amended.

Newly enacted Section 312(g) of the Communications Act, 47 U.S.C. 312(g) provides:

(g) Limitation on silent station authorizations. 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, notwithstanding any provision, term, or condition of the license to the contrary.

In the case at hand, should Peninsula immediately cease operation of its Translators, and should the United States Court of Appeals thereupon vacate the Commission's orders in this proceeding more than 12 months thereafter, the licenses for the Translators would have ceased to exist, Peninsula would no longer have broadcast licenses for its Translators for the Commission to reinstate and upon which to grant the subject license renewal applications. Peninsula will not, and cannot, allow such a scenario to come to pass since it believes that it will ultimately prevail in its appeal.

It is undisputed that Peninsula has not been given "...notice and opportunity for a hearing..." in accordance with Section 309(e) of the Communications Act prior to the denial of the license renewal applications for its Translators. It is also undisputed that Peninsula has never been issued an order to show cause why its Translator licenses

should be modified or revoked in conformity with the requirements of Section 312(c) of the Communications Act. Therefore, because the Commission's various orders in this proceeding denying the license renewal applications and revoking the Translator licenses conflict with the clear statutory language of the Communications Act, Peninsula is confident the Court will ultimately vacate the orders and require the Commission to accord Peninsula the administrative due process to which it is entitled. *C. f. National Public Radio, Inc. V. Federal Communications Commission*, July 3, 2001, No. 00-1246 [application of auction procedures to noncommercial broadcast applications in conflict with Communications Act section 309(j)(2) requiring action to be vacated without the need for consideration of other arguments by appellants]. At that point, it is incumbent on Peninsula to ensure that the licenses for its Translators remain viable and in full force and effect. Peninsula intends to protect and defend the viability of its Translator licenses to the fullest extent of its ability.

In an attempt to "clear the air" in connection with Peninsula's continued operation of the Translators, and in spite of the clear mandate provided under the Commission's rules and policies for Peninsula to continue such operation while its license renewal applications remain pending, on February 23, 2000, Peninsula filed a motion to stay the effect of the January 2000 *Memorandum Opinion and Order* in this proceeding, 15 FCC Rcd 3293 (2000). To date, almost seventeen (17) months later, the Commission has failed to take any action on this motion for stay. I would renew the request for the Commission to stay its order pending the final determination of the Court of Appeals and/or the final determination of the Commission in this matter.

The Commission's Notice attempts to characterize Peninsula as a licensee who would intentionally and blatantly violate the Commission's rules and policies, and ignore a legitimate Commission order or mandate. This is unsupported by the record in this proceeding and Peninsula's record as a Commission broadcast licensee since 1979. Peninsula is a family-owned broadcasting company consisting of my wife, Eileen Becker, and myself. We have operated AM, FM and FM translator stations licensed by the Commission since we were first issued a license for KGTL-FM, Homer Alaska (now KWV-FM) in 1979. Over the course of the last 22 years, and up until the issuance of the Notice, Peninsula has never been cited by the Commission for any knowing violation of its rules and/or policies in connection with the operation of its broadcast stations. It has acted as a responsible and conscientious broadcast licensee of the Commission and will continue to do so. However, Peninsula will not sacrifice its statutory rights to continue to operate its duly licensed Translators under the duress and threat of an unwarranted and wholly inappropriate fine of \$140,000.00. I would ask the Commission to reconsider this action within the context of this Declaration and the facts contained herein, subject to my right to supplement those facts and this request for reconsideration.

I hereby declare, under penalty of perjury, that the facts contained herein, except those for which official notice may be taken, are true and correct to the best of my personal knowledge and belief.

Date: September 10, 2001

David F. Becker, President
Peninsula Communications, Inc.

I hereby declare, under penalty of perjury, that the facts contained herein, except those for which official notice may be taken, are true and correct to the best of my personal knowledge and belief.

Date: September 10, 2001

A handwritten signature in black ink that reads "David F. Becker". The signature is written in a cursive style with a large, looping initial "D".

David F. Becker, President
Peninsula Communications, Inc.

ATTACHMENT A

United States Court of Appeals

District of Columbia Circuit

Washington, D.C. 20001-2866

General Information
(202) 216-7000

Facsimile Number
(202) 219-8530

ENTRY OF APPEARANCE

Case No. 01-1273

CAPTION PENINSULA COMMUNICATIONS, INC.,
v. Appellant,
FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

PARTY

The Clerk will enter my appearance as counsel for:

- Appellant(s)
 Petitioner(s) _____
Name of Party
- Appellee(s) Federal Communications Commission
 Respondent(s) _____
Name of Party
- Intervenor(s) _____
Name of Party
- Amicus Curiae _____
Name of Party

ATTORNEY

Name *Jane E. Mago* Phone (202) 418-1700
Jane E. Mago, General Counsel

Name *Daniel M. Armstrong* Phone (202) 418-1740
Daniel M. Armstrong, Associate General Counsel

Name *Gregory M. Christopher* Phone (202) 418-1740
Gregory M. Christopher, Counsel

Firm Federal Communications Commission

Address 445 12th Street, S.W., Room 8-A741
Washington, D.C. 20554

NOTE: Must be submitted by a member of the Bar of the USCA for the D.C. Circuit.