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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
INVESTIGATIVE & ENFORCEMENT BUREAU

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

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

To: The Commission

**ENFORCEMENT BUREAU'S COMMENTS ON
REQUEST TO REOPEN THE RECORD AND FOR OFFICIAL NOTICE**

1. On December 14, 2004, Peninsula Communications, Inc. ("PCI") filed a "Request to Reopen the Record and for Official Notice" ("PCI Request"). PCI requests that the Commission reopen the record and take official notice of newly enacted amendments to the Communications Act (the "Act"). PCI argues that the amendments are directly relevant and controlling and prohibit PCI from being fined or subject to any other penalty, including revocation.¹ The Bureau agrees that the Commission should reopen the record to address PCI's Request and that it should

¹ See PCI Request at 3.

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take official notice of the referenced amendments to the Act. The Bureau disagrees, however, with PCI's apparent conclusion that new section 307(f)(2) of the Act requires termination of the instant proceeding. Specifically, based on the plain language of the amendments and the current record of this proceeding, it appears that PCI does not fall within the amendments' scope.

2. Background. This proceeding arose as a result of PCI's actions following release of a Commission *Memorandum Opinion and Order* ("Order"), 16 FCC Rcd 11364 (2001) (Official Notice Ex. 13), that directed PCI to terminate operation of seven FM translators in Alaska. PCI did not do so. Although PCI filed an appeal with the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") to overturn the Commission's *Order*, PCI never received a stay of the Commission's *Order* from the Commission or the D.C. Circuit.²

3. Several months later, the Commission released a *Notice of Apparent Liability for Forfeiture and Order* ("NAL & Order"), 16 FCC Rcd 16124 (2001) (Official Notice Ex. 14), that, *inter alia*, notified PCI that further operation of the seven translators might raise serious questions about PCI's qualifications to be a Commission licensee and might result in proceedings that could lead to the revocation of one or more of PCI's licenses. PCI responded to the *NAL & Order* by declaring that it had operated the translators and would continue to do so until such time as the D.C. Circuit ruled on its appeal.

4. On February 6, 2002, the Commission released the *Order to Show Cause* ("OSC"), 17 FCC Rcd 2838 (2002), which commenced this proceeding. Among other things, the Commission noted the possibility that the D.C. Circuit could ultimately reinstate the licenses of

² Ultimately, the D.C. Circuit upheld the Commission's order that terminated PCI's operating authority for the seven translators. See *Peninsula Communications, Inc. v. FCC*, No. 01-1273 (D.C. Cir. Jan. 30, 2003).

the seven translators. The Commission stated that even if the translator licenses were reinstated, PCI's conduct – operation of the seven translators following receipt of the *Order* to shut down – raised questions as to whether PCI should be entitled to continue as licensee.

5. Although the Bureau advocated in its “Proposed Findings of Fact and Conclusions of Law” that the appropriate outcome in the captioned proceeding was revocation of all of PCI's licenses, the *Initial Decision*³ (the “*ID*”) revoked only two of PCI's full-power broadcast licenses, those for Alaska Stations KWVV-FM, Homer, and KPEN-FM, Soldotna, whose signals were broadcast by the seven translators that the Commission had ordered off the air. The Bureau did not file exceptions to the *ID*; PCI did, and its exceptions are pending before the Commission.

6. PCI's Request. PCI asks the Commission to take official notice of a certain section of the Consolidated Appropriations Act, 2005, namely, Title IX, section 213. PCI accurately quotes that section's provisions, which amend sections 307 and 312 of the Act. PCI appears to contend that the newly-enacted subsection 307(f)(2) of the Act prohibits the Commission from fining PCI or subjecting it to any other penalty, including revocation of any licenses, for providing translator service after the Commission ordered it not to do so. The Bureau disagrees.

7. New subsection 307(f)(1) provides that “any holder of a broadcast license may broadcast to an area of Alaska that does not have access to over the air broadcasts” via, *inter alia*, a translator, a microwave, or an alternative means of signal delivery, “even if another holder of a broadcast license begins broadcasting to such area.” New subsection 307(f)(2), the provision at issue here, further provides that “any holder of a broadcast license who has broadcast to an area of Alaska that did not have access to over the air broadcasts via translator,

³ FCC 03D-01 (rel. June 19, 2003).

microwave, or other alternative signal delivery may continue providing such service even if another holder of a broadcast license begins broadcasting to such area, and shall not be fined or subject to any other penalty, forfeiture, or revocation related to providing such service including any fine, penalty, forfeiture, or revocation for continuing to operate notwithstanding orders to the contrary.” Thus, based on the plain language of the statute, PCI would be exempt from license revocation here only if the areas where it provided translator service in violation of the Commission’s *Order* are areas in which it has “broadcast to an area of Alaska that did not have access to over the air broadcasts.” That the scope of the statute is limited to such unserved areas is further supported by the title of section 213: “Authorizing Broadcast Service in Unserved Areas of Alaska.”⁴

8. PCI provides no evidence to demonstrate that it fits within the language of the statute. To the contrary, the record evidence in this proceeding shows that PCI did not provide the first broadcast service in any of the areas served by the translators ordered off the air by the Commission in May 2001. Specifically, for the areas served by PCI translators K283AF, Kenai/Soldotna and K285EF, Kenai, which started broadcasting no earlier than 1983 and 1991, respectively,⁵ Stations KSRM(AM) and KQOK-FM (now KWHQ-FM), licensed to KSRM, Inc., were already providing service.⁶ Likewise, the record demonstrates that, in the Homer area, PCI translators K257DB, Anchor Point, K265CK, Kachemak City, and K272CN, Homer, began

⁴ We are not aware of any legislative history to the section.

⁵ PCI, Ex. 1, p. 5; PCI Ex. 6, p. 29; EB Ex. 6, pp. 13, 17, 32 (K283AF); EB Ex. 7, pp. 15, 18; Tr. 166-67 (K285EF).

⁶ EB Ex. 31, p. 1.

transmitting in the mid-1980s,⁷ well after Station KBBI(AM) and translator K265AG, Homer, neither of which was licensed to PCI, had commenced service in 1979.⁸ Finally, the record shows that, in Kodiak, PCI's first translator started operation after translator K292BN, licensed to the Kodiak Community Church, Inc.,⁹ the entity from which PCI acquired its second translator in 1988.¹⁰ Consequently, it appears that none of PCI's translators provided service "to an area of Alaska that did not have access to over the air broadcasts." Accordingly, inasmuch as PCI's translators did not provide the first broadcast service in the areas served thereby, the newly-enacted subsection 307(f)(2) appears not to give PCI the relief it seeks. Thus, rather than terminate this proceeding, the Commission should rule on PCI's exceptions.

9. Accordingly, the Bureau supports the Commission reopening the record and taking official notice of the new provisions of the Act cited by PCI. However, the Bureau submits that PCI has not demonstrated that those provisions apply to it, and that the record suggests they do

⁷ EB Ex. 3, p. 19-22 (K272CN); EB Ex. 5, pp. 18-21 (K265CK); EB Ex. 8, p. 18 (K257DB).

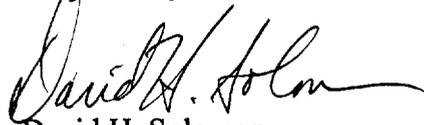
⁸ PCI Ex. 1, p. 1; EB Ex. 31, p. 1; Official Notice Ex. 1.

⁹ EB Ex. 4, pp. 88-89, 93 (K274AB, formerly K272BW).

¹⁰ EB Ex. 9, pp. 43-53 (K285AA).

not. Thus, termination of this proceeding is not warranted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David H. Solomon". The signature is fluid and cursive, with a long horizontal stroke at the end.

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December 17, 2004

Certificate of Service

James W. Shook, Special Counsel in the Enforcement Bureau's Investigations and Hearings Division, certifies that he has on this 17th day of December, 2004, sent by email and by first class United States mail, a copy of the foregoing "Enforcement Bureau's Comments on Request to Reopen the Record and for Official Notice" to:

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